

PRE-SCREENING NOTIFICATION

Scottish Government version

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Responsible Authority:

MARINE DIRECTORATE – Marine Nature Enhancement Unit

Title of the plan:

Proposals for changes to existing legislation applicable to Scotland's terrestrial and inshore marine region.

What prompted the plan:

(e.g. a legislative, regulatory or administrative provision)

A package of potential legislative amendments is being considered, including amendments to the Marine (Scotland) Act 2010¹ ("the 2010 Act"):

- amendments to marine protection and enhancement provisions under Part 5 of the 2010 Act;
- new provisions to enable marine restoration projects;
- provision of new enabling powers in relation to retained EU law, namely the Conservation (Natural Habitats, &c.) Regulations 1994² ("the 1994 Habitats Regulations"), the Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017³ ("the 2017 Marine Works Regulations"), and potentially other EIA Regulations for which the Scottish Parliament has legislative competence⁴.

The 2010 Act provides a framework for managing Scotland's inshore waters, including a duty to protect and enhance the marine environment. The Act introduced -

- A statutory marine planning system to sustainably manage the increasing, and often conflicting, demands on our seas;
- A simplified marine licensing system, minimising the number of licences required for development in the marine environment;
- New marine nature and historic conservation measures, with powers to protect and manage areas of importance for marine wildlife and habitats (beyond those already afforded protection by the National Site Network, previously known as the Natura network) and historic monuments;
- Improved protection for seals and a new, comprehensive licensing system to ensure appropriate management where necessary; and
- A range of enhanced enforcement powers relating to marine conservation and licensing.

The proposals would strengthen existing provisions relating to marine protection and enhancement, and provide a means to streamline processes around marine restoration projects. The potential marine restoration proposals would provide a means to address two key issues that may be hampering restoration efforts: 1) Community groups have raised concerns that the current marine licensing and consenting regimes are challenging for community scale projects to navigate; and 2) Once restoration projects, especially native oyster restoration and seagrass planting, have been put in place, it is difficult to protect them from other marine activities. To date, projects have tried to resolve this by seeking Demonstration and Research MPA ("D&R MPA") status. This is a

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cumbersome process for Government and stakeholders for the relatively small restoration projects currently underway, and many such projects don't necessarily meet the criteria for a D&R MPA.

Action to restore the marine environment will contribute towards the Scottish Biodiversity Strategy⁵ (which has the vision to restore and regenerate biodiversity across our land, freshwater and seas by 2045), and international targets under the United Nation Convention on Biological Diversity⁶ and the OSPAR Northeast Atlantic Environment Strategy⁷. In addition, the European Union is developing a Nature Restoration Law⁸ that will require significant action by EU Member States between now and 2050.

The proposed enabling powers in relation to the 1994 Habitats Regulations, the 2017 Marine Works Regulations and potentially other EIA Regulations for which the Scottish Parliament has legislative competence, would replace powers lost to Scottish Ministers when the UK exited the European Union (EU), which allowed them to amend Regulations derived from EU law if this were required in future.

Section 2(2) of the European Communities Act 1972⁹ ('the EC Act') provides a power to make secondary legislation for the purpose of implementing EU law. Both the 1994 Regulations and the 2017 Regulations were made under section 2(2) of the EC Act and subsequently amended using the same power. Therefore, following the UK's withdrawal from the EU and repeal of the EC Act by the European Union (Withdrawal) Act 2018, the Scottish Ministers no longer have enabling powers to amend these regulations, other than to 'keep pace' with EU law as provided for in section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021¹⁰.

Plan subject:
(e.g. transport)

Environmental legislation in Scotland and Scottish inshore waters

¹ [Marine \(Scotland\) Act 2010](#)

² [The Conservation \(Natural Habitats, &c.\) Regulations 1994](#)

³ [The Marine Works \(Environmental Impact Assessment\) \(Scotland\) Regulations 2017](#)

⁴ [Town and Country Planning \(Environmental Impact Assessment\) \(Scotland\) Regulations 2017; Forestry \(Environmental Impact Assessment\) \(Scotland\) Regulations 2017; Agriculture, Land Drainage and Irrigation Projects \(Environmental Impact Assessment\) \(Scotland\) Regulations 2017 and Roads \(Scotland\) Act 1984 \(Environmental Impact Assessment\) Regulations 2017; Transport & Works \(Scotland\) Act 2007; Schedule 3 of the Harbours Act 1964](#)

⁵ [Biodiversity strategy to 2045: tackling the nature emergency](#)

⁶ [Convention on Biological Diversity](#)

⁷ [OSPAR North East Atlantic Environment Strategy 2030](#)

⁸ [Proposed EU Nature restoration law](#)

⁹ [European Communities Act 1972](#)

¹⁰ [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#)

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Brief summary of the plan:

(including the area or location to which the plan related)

The plan takes the form of a series of potential¹¹ proposals in relation to (1) the provision of enabling powers to allow for amendments to the 1994 Habitats Regulations and the 2017 Marine Works Regulations (and potentially other EIA Regulations for which the Scottish Parliament has legislative competence); (2) technical amendments to provisions of the 2010 Act in respect of marine protection and enhancement (Part 5); and (3) the provision of a means to implement a streamlined process for regulating marine restoration projects.

The potential proposals can be summarised as follows:

Enabling powers in relation to the 1994 Habitats Regulations and the 2017 Marine Works Regulations

- An enabling power to provide Scottish Ministers with the means to amend (other than for the purpose of keeping pace with the EU) the 2017 Marine Works Regulations, if required. There is also the potential to seek this power in relation to other Regulations for which the Scottish Parliament has competence, where powers to amend the Regulations under the European Communities Act 1972 are no longer available following the UK's exit from the European Union.
- An enabling power to provide Scottish Ministers with the means to amend (other than for the purpose of keeping pace with the EU) the 1994 Habitats Regulations, if required. Such a power could be used, for example, to consolidate the Regulations.

Amendments to Marine Protection and Enhancement provisions (Part 5 of the 2010 Act)

- Clarification of the consultation process for Marine Consultation Orders ("MCOs").

The aim would be to address an existing inefficiency in the consultation process for MCOs. The current provisions of the 2010 Act require the Scottish Ministers to publish a draft order and notice of intention to make the order, and invite representations to be made by a specified time. However the provisions do not clarify what should happen after representations have been made. Where previous draft MCOs have been amended following representations a further consultation has taken place as it has been considered to be a "new" draft order. This results in an inefficient and time consuming even when minor changes are being made. A potential solution would be to amend the relevant provisions of the 2010 Act to provide clarity on what happens following receipt of representations, for example, requiring Scottish Ministers to publish a modifications report when laying a MCO in Parliament, stating what changes were made and why following representations.

Provisions in relation to marine restoration projects

- Provision of a means to implement a streamlined process for regulating marine restoration projects.

¹¹ It is noted that in some cases, other delivery options are also being explored and therefore primary legislation may not be required. This pre-screening report is being completed on the assumption that primary legislation will be taken forwards.

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The aim would be to reduce the perceived barriers and challenges for marine restoration projects in navigating the existing regulatory regime, acting as an enabler to the nature restoration sector as restoration will be vital in meeting commitments under the Scottish Biodiversity Strategy. The proposals would also aim to allow improved regulation and oversight of marine restoration activities

It is noted that we are also exploring options for a means to restrict other marine activities in areas where marine restoration projects are in place, in order to protect the restoration project from damage. This could be via expanding the use of existing MCOs, which can currently only be applied to Marine Protected Areas (MPAs) or to European Marine Sites (EMS) which overlap an MPA. We are also considering the potential to amend existing MCO provisions within the 2010 Act to extend the use of MCOs to European marine sites and Priority Marine Features, to simplify and enhance the process and options available to protect these types of sites. These proposals are noted here for completeness, but we do not consider that they will have no or minimal environmental effects and they are therefore being taken forwards for SEA screening.

The proposals relate to Scotland and Scotland's inshore region (0-12nm).

Brief summary of the likely environmental consequences:

(including whether it has been determined that the plan is likely to have no or minimum effects, either directly or indirectly)

The proposals for legislative changes are not considered to have more than minimal effects on the environment. An analysis of each area of proposed change and its likely environmental consequences is considered as follows:

Enabling powers in relation to the 1994 Regulations and the 2017 Regulations

The use of enabling powers to allow Scottish Ministers to make changes to HRA and EIA regimes could potentially have a significant impact on the environment, either positive or negative. However, introduction of the enabling powers in themselves would not have an environmental impact. Any subsequent amendments to the 1994 Regulations and the 2017 Regulations would be implemented via secondary legislation. It is therefore recommended that a further assessment be undertaken at that stage to establish whether a full Strategic Environmental Impact Assessment ("SEIA") would be required.

Amendments to Marine Protection and Enhancement provisions (Part 5 of the Act)

Provision of a means to implement a streamlined process for regulating marine restoration projects.

The use of these powers could potentially have a significant impact on the environment, either positive or negative. However, introduction of the powers in themselves would not have an environmental impact. It is therefore recommended that a further assessment be undertaken as part of the development of any subsequent secondary legislation, to establish whether a full SEA would be required.

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Amendment to current MCO provisions to clarify a process for consultation on such Orders

This proposal would make a technical, procedural amendment to the provisions of the 2010 Act to remove an existing inefficiency. This will not have an impact on whether or not an MCO is implemented. It is therefore considered that the proposal would not have a significant impact on the environment.

Brief summary of how environmental principles have been considered:

(including whether any of the guiding principles, as set out in section 13 of the Continuity Act, are relevant to the plan)

The environmental principles of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2020 are considered as follows:

The precautionary principle:

As outlined at box 6 above, the proposals for legislative changes are not considered to have more than minimal impacts on the environment at this stage. This principle has been considered in reaching this decision and it is therefore not envisaged that protective measures are required to mitigate against potential environmental damage and high risk of harm at this stage.

The polluter pays principle:

The introduction of enabling powers in relation to the 1994 Regulations and the 2017 Regulations would, if necessary, allow Scottish Ministers to implement changes associated with assessment of environmental impacts and compensation for environmental damage in the future. The polluter pays principle will therefore be considered at the stage that any changes are implemented, either by way of policy guidance and/ or legislative vehicles.

It is possible that proposals for marine restoration projects, and revisions to Part 5 of the 2010 Act could have a positive impact on water pollution. Again, the polluter pays principle will be re-considered as part of the Strategic Environment Assessment process for future implementation plans, such as policy guidance and/ or legislative vehicles.

The prevention principle:

The proposals for enabling powers in themselves do not significantly alter current approaches to marine licensing, planning and conservation. This principle will be applied when potential impacts on the environment are being assessed to inform policy development and/ or legislative changes at that future stage.

The existing marine conservation provisions within the 2010 Act provide a framework for protecting Scotland's marine environment in the inshore region. The proposed amendments would address existing inefficiencies with these provisions and may therefore have a positive impact on their ability to ensure that environmental damage is prevented.

The rectification at source principle:

As per the polluter pays principle, this principle will be considered at the stage that any changes in relation the 1994 Regulations and 2017 Regulations are implemented.

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Integration requirement:

This pre-screening for the environmental impact assessment has been considered and created the development of the proposals.

Contact details:

[Redacted contact details]

Date of opinion:

16 November 2023

When completed send to: SEA.gateway@scotland.gsi.gov.uk or to SEA Gateway, Scottish Government, Area 2H (South), Victoria Quay, Edinburgh, EH6 6QQ