Submitted via email: scrutiny@parliament.uk

28th April 2025

House of Commons Public Bill Committee: Planning and Infrastructure Bill – Call for evidence

1. On behalf of RenewableUK and Scottish Renewables' members, we welcome the opportunity to respond to the Planning and Infrastructure Bill call for evidence.

2. RenewableUK (RUK) members are building our future energy system, powered by clean electricity. We bring them together to deliver that future faster; a future which is better for industry, billpayers, and the environment. We support over 500 member companies to ensure increasing amounts of renewable electricity are deployed across the UK and access markets to export all over the world. Our members are business leaders, technology innovators, and expert thinkers from across industry.

3. 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 more than 360 organisations that deliver investment, jobs, social benefit and reduce the carbon emissions which cause climate change.

4. Effective delivery of renewable energy in the UK will be crucial to achieving the Government's Clean Power 2030 mission, as well as meeting net zero targets and interim carbon budgets. Wind power will not only provide greater energy security but also offer a more cost-effective option for energy generation and create economic opportunities.

5. Currently, barriers in the planning process are leading to delays and increased costs for the delivery of wind development across the UK, including the ports and grid upgrade projects required to connect, construct and operate these projects.

6. We welcome the introduction of the Planning and Infrastructure Bill (thereafter 'the Bill'), which seeks to address barriers in the planning process. However, whilst the Bill sets a positive direction of travel, we are concerned that it currently does not go far enough to

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deliver urgent changes needed now to accelerate the rollout of renewable energy across the UK and to deliver Clean Power 2030. The Bill could benefit from more details regarding important aspects, which we have highlighted in this response. Furthermore, there are some missed opportunities to create further initiatives to ensure delivery of a greater number of planning consents at a local level without compromising community consultation, and to support Nationally Significant Infrastructure Projects (NSIPs), particularly linear projects[1] and those with offshore components.

7. We strongly recommend that the Bill is amended to support offshore wind and other marine economy National Significant Infrastructure Projects (NSIPs). This can be achieved by:

7.1. extending the geographical scope of the Bill beyond territorial waters to include the full Exclusive Economic Zone (EEZ), and by

7.2. extending powers to create and deliver Environmental Delivery Plans (EDP) beyond Natural England, to also include the Joint Nature Conservation Committee as the statutory consultee for the offshore (beyond territorial waters) environment.

8. We believe there may be opportunities within the Bill to increase the level of pragmatism applied to the interpretation of the Habitats Regulations, particularly during Stage 1: Screening and Stage 2: Assessment. The approach to the Habitats Regime has become overly complex and inefficient, leading to delays in consenting and deployment of renewable projects. Examples of its inefficiencies are set out in Annex A. Therefore, we endorse the recommendations in the proposal paper "Creating a Habitats Regime That Works for Major Infrastructure" by Catherine Howard, Partner and Head of Planning at Herbert Smith Freehill, which is also included in Annex A.

9. We welcome the intent of the Bill regarding changes to the Scottish planning system. The Bill includes changes that will support faster determinations. But it also includes changes that may considerably slow down planning in Scotland, especially as more is demanded of statutory consultees without a commensurate increase in capacity to handle the increased workload. We have highlighted which clauses require

[1] Linear infrastructure projects involve the construction and management of infrastructure elements that extend in a straight line, connecting two or more points. Examples include roads, railways, pipelines, and power lines. These projects play a crucial role in connecting communities, facilitating transportation, and enabling resource distribution.

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clarifications and amendments to ensure that the Bill's goals of faster planning determinations can be realised.

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Call for Evidence - response

In the subsequent section (sections 10 to 50), we have outlined RenewableUK and Scottish Renewables' support of proposals in this Bill as well as proposed amendments and clarifications to strengthen key aspects of the Bill.

We are furthermore setting out proposals in sections 51 to 60, which we believe will have a significant impact on the delivery of renewable energy in the UK

Part 1: Infrastructure

Chapter 1: Nationally Significant Infrastructure Projects

10. **Clause 1 – National Policy Statement review:** We support the proposal to require that National Policy Statements are updated at least every five years and that a more streamlined process for making changes to the National Policy Statements is introduced. It will be important that clear transitional arrangements and grandfathering provisions are in place to ensure maximum certainty for industry. In addition, the clause should include a clear definition of "exceptional circumstances" under which reviews can be delayed, ensuring that National Policy Statement updates cannot be delayed. In addition, prior to making an exceptional circumstance statement, the Secretary of State should consult with the relevant House of Commons Select Committee.

11. **Clause 2 – National policy statements, parliamentary requirements:** More clarity is needed regarding the scope of the court proceedings amendment criterion. For example, if a court decision has been appealed but the appeal has not yet been determined, is it right for the National Policy Statement to be updated before the conclusion of the appeal (and any subsequent appeal).

12. **Clause 3 – Power to disapply requirement for development consent:** We support the introduction of a power enabling the relevant Secretary of State to direct projects out of the Nationally Significant Infrastructure Projects (NSIP) regime, provided this is implemented in a clear, transparent, and predictable manner. Otherwise, this could introduce uncertainty into the process and could significantly impact project milestones and costs. It is not yet clear from the Bill how this power would be exercised, including details on eligibility criteria, timings and the interplay with other planning regimes. For example, it is unclear how the requirement for evidence that the alternative consenting authority is aware of the request would work in practice. In addition, any alternative consenting route will need to be adequately resourced and not cause inadvertent delays to other types of development. Further clarification is also required with regard to the status of National Policy Statements. The Bill should clarify that any National Policy Statement relating to the development type continues to be relevant and considered in any determination by the alternative consenting authority. We are concerned that a local planning authority may disregard the national need provisions within the National Policy Statement or require disproportionate information.

13. **Clause 4 – Application for development consent, consultation:** We welcome the changes to subsection 37(7) of the Planning Act as set out currently in the Planning and Infrastructure Bill. We furthermore welcomed the amendment NC44 introduced by the Ministry of Housing, Communities and Local Government on 23 April 2025 that would remove the pre-application requirement. Industry has a long track record of engaging early and closely with local communities and a wide range of stakeholders, and this will continue following the proposed changes. We encourage the Government to develop clear guidance together with industry and relevant stakeholders. In addition, while amendment NC44 would remove mandatory pre-application in England and Wales, clause 14 would enable the Scottish Government to move forward with a mandatory pre-application process in Scotland – and therefore two separate approaches.

14. **Clause 5 – Consultation with category 3 persons:** We strongly support changes proposed to category 3 persons. Consulting with category 3 persons once the final scope of the development is known will streamline the process and reduce the overall time for the consultation process. There remains a number of opportunities for 'Category 3' persons to engage with the process. The change avoids additional updates for developers' pre-application and unnecessary engagement with potential

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Category 3 persons where these persons are ultimately not affected by the proposals, as the scheme is refined. While referenced in the Bill, more clarity should be included on the appropriate level of consultation and reporting that will be required.

15. **Clause 6 – Application for development consent, acceptance stage:** The current clause should clearly define the test to determine if an application is suitable and therefore allowed to proceed to examination. A suitability definition should include a reference that all requisite pre-application requirements have been fulfilled, and all statutorily required documents and evidence have been submitted. We are concerned that the lack of clarity would allow for objectors to argue that an application is not sufficient. Additionally, without certainty as to how this change will be implemented in practice, developers are likely to continue to take a 'belts and braces' approach to ensure compliance and reduce the risk of an application not being accepted. It is also important that judgments are proportionate. For example, if the Planning Inspectorate (PINS) requires agreement with statutory bodies to accept an application, this may not be achievable, which could inadvertently cause delays. Thirdly, it is the duty of statutory consultees and local authorities to identify and narrow down areas of disagreement during the pre-application stage. We are concerned about the engagement with consultees, who are dealing with complex issues which take time to resolve. This could lead to more objections early on. With regard to the acceptance stage, more clarity will be required to fully understand how the proposal will work in practice and how PINS will test whether sufficient discussions have taken place and how areas of disagreement have been sufficiently narrowed down at the point of application acceptance.

16. **Clause 7 - Application for development consent – costs:** Clarity would be welcomed on the scenario where the application is withdrawn by a developer due to circumstances outside their control, and whether costs would still apply.

17. **Clause 8 – Planning Act 2008 legal challenges:** We welcome the decision regarding legal challenges, which will not impact well-argued cases with merit. Judicial reviews continue to delay the delivery of critical infrastructure. Stakeholders have sufficient opportunities to engage in each application. We would like to stress the importance that all stakeholders engage meaningfully at the pre-application and application stage to ensure that concerns and issues are raised early and can be considered and, where possible, addressed to reduce the likelihood of legal challenges post-consent.

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Finally, the Bill should clarify whether a route to the Supreme Court on grounds of unreasonable judgment still exists.

Chapter 2: Electricity Infrastructure

18. **Clause 9 – Connections to electricity network: licence and other modifications:** We are supportive of the powers outlined in the clause, under the condition that the powers would only be implemented temporarily and that they can only be exercised in limited circumstances, which should be fully defined in the bill. In addition, due consideration is given to how such an intervention will affect other projects in the queue. Furthermore, the use of the term 'improving the process for managing connections' is subjective and ambiguous. The clause should come with a requirement to publish the rationale for change if modifications are made, in order to ensure transparency. We would also support a requirement to consult with system users prior to modifications.

19. **Clause 10 – Scope of modification power under section 9:** This section should include further clarification regarding the scope and extent of potential changes that are envisaged for the qualifying distribution agreements. In the absence of detail, it could mean unlimited scope to amend terms.

20. **Clause 11 - Procedure relating to modification under section 9 –** We have a number of clarification questions regarding this clause:
    - **20.1.** Given section 9 makes explicit reference to the authority having the ability to amend a "qualifying distribution agreement", the impacted parties with a "qualifying distribution agreement" would also need to be explicitly referenced in Clause 11. The impacted parties include as outlined in Clause 9, the holder of any electricity licence proposed to be modified, the Independent System Operator and Planner, the Gas and Electricity Markets Authority (GEMA) or the Secretary of State (depending on which relevant authority is proposing to make the modification), and such other persons as the relevant authority considers appropriate."
    - **20.2.** More clarity is needed on the scope of new powers for the Secretary of State to modify connection agreements.
    - **20.3.** The clause should set out a guarantee that all relevant stakeholders are consulted on any changes, and how this is communicated. The timescales and timeframe for consulting are also critical and should be defined to keep progressing at pace with Clean Power 2030. For example, the clause currently

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sets out that details of changes are to be published 'as soon as reasonably practical'. This provides no certainty, and we would recommend a timescale be introduced for this, as this could have an impact on several areas, including decision-making for signing offers or applying for future CMP434 windows.

21. **Clause 12 – Direction to modify connection agreements:** More clarity is needed on how this clause would be implemented in practice and in relation to existing powers.

22. **Clause 13 – Managing connections to the network, strategic plans:** Whilst we support the alignment with strategic plans such as the Strategic Spatial Energy Plan, Regional Energy Strategic Plan, and the Centralised Strategic Network Plan, our main concern around this clause is the inaccurate data that is currently being fed into these plans.

23. **Clause 14 – Consents for generating stations and overhead lines, applications [Annex B]:** We welcome the intention to modernise Scotland's electricity infrastructure consenting arrangements and the aim to increase efficiency and proportionality within the system. However, a mandatory pre-application process is unlikely to achieve the goal of shortening planning timeframes. In a joint response to the consultation on Electricity Infrastructure Consenting in Scotland December 2024 (see Annex B), Scottish Renewables and RenewableUK raised concerns that front-loading more work into a pre-application process and creating formalised pre-application requirements without addressing broader consenting challenges or significantly increasing statutory consultee resourcing, is not likely to reduce consenting timelines and could increase costs. We are concerned this will result in an administratively burdensome exercise that creates additional barriers to consenting renewable energy proposals. Through a pre-application process with gate checking before a proposal is 'submitted', timelines for consenting projects will become less transparent. Local planning authorities could veto projects on minute technicalities as they go through the pre-application process or simply object to proposals they haven't had the time to review properly. The intention behind this clause was to align the planning system with England and Wales, however Amendment NC44 would remove mandatory pre-application from this Bill in England and Wales. Moving forward with a mandatory pre-application process in Scotland would create a burdensome system out of step with England and Wales.

24. Should the mandatory pre-application process move forward in Scotland, we are concerned that clause 14 only sets out future regulation-making powers rather than

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specific arrangements. Creating the guidance or secondary legislation will impose further delays. This includes setting fixed timescales for key stages of the consenting process, which are urgently needed to increase predictability, transparency and confidence. Related to this, we are disappointed that Department for Energy Net Zero (DESNZ) policy decisions, which we understand had already been agreed to with the Scottish Government, to limit the pre-application notification period for community consultation to six weeks, limit the acceptance stage to 28 days, and provide a six month grace period for inflight projects to comply with pre-application requirements have not been given effect within the Bill and are deferred to regulations. The need for secondary legislation and the timescales for it are likely to delay the implementation of much-needed reforms and generate uncertainty for the industry. Regarding specific considerations, we would like to highlight:

24.1. In a joint response to the consultation on Electricity Infrastructure Consenting in Scotland in December 2024, Scottish Renewables and RenewableUK raised concerns that front-loading more work into a pre-application process and creating formalised pre-application requirements without addressing broader consenting challenges or significantly increasing statutory resourcing, is unlikely to reduce consenting timelines and could increase costs.

24.2. We welcome the addition of section 7B to Schedule 8 to the Electricity Act 1989, which will enable fixed time limits for key stages of the consenting process and deadlines to be set for all parties. However, it should be clear when these determinations will be made. We are disappointed that the Bill lacks specific time limits. Requiring future regulations to outline time limits is inconsistent with the Planning Act 2008, which includes specific time limits for key stages, such as examination, on the face of the primary legislation.

24.3. We also welcome the default requirement for a public inquiry to be replaced with a new reporter-led examination process. This will likely lead to a more efficient consenting process. However, the new examination procedure is currently limited to local planning authorities. The replacement of public local inquiries with a reporter-led process will not apply to objections made by other statutory consultees. This would create two separate processes for a public local inquiry, depending on the authority objecting to the proposal, which would be inefficient in meeting the goal of shortening timelines for inquiries.

24.4. Having two public local inquiry processes would impact offshore wind projects disproportionately, as local planning authorities are not the objecting authority to offshore wind proposals. This means that offshore wind proposals would have an automatic full public local inquiry without the narrowed scope and would not

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benefit from shortened timeframes promised in this Bill from a reporter-led approach.

24.5. Finally, there is a need for an implementation mechanism in instances where local planning authorities do not respond to Scottish Ministers during the non-extendable acceptance period of 28 days. We recommend that a deemed approval or determination by the Scottish Ministers in the absence of a local planning authority (LPA) response should apply.

25. **Clause 15 – Variations of consents:** We have concerns over the new powers to vary, suspend or revoke consent. While we strongly support the power to correct minor variations or errors in the drafting of consent without generating an administrative burden, the new powers could introduce uncertainty and weaken investor confidence. More clarity is needed on the type of variations in case of changes in technical or environmental circumstances, and whether the power could be applied as a condition of discharging or amending existing conditions. To avoid undue pressure, the power should be limited to standalone use.

26. **Clause 16 – Proceedings for questioning certain decisions on consent:** We welcome the proposal to introduce a six-week time limit for initiating a challenge to a consenting decision of Scottish Ministers for onshore electricity infrastructure.

27. **Clause 17 – Application for necessary wayleaves, fees:** We agree with introducing a fee, but all fees proposed here should be ringfenced and guarantee service improvements. Clarity would be welcomed on whether the variable fees charged by local authorities will be replaced by the fees to be paid to Scottish Ministers.

28. **Clause 20 – Environmental impact assessments for electricity works:** We are concerned that the limited scope of the Environmental Impact Assessment (EIA) regulation amendment power is misaligned with the previous wider power to amend such regulations and the newly proposed powers in the Natural Environment (Scotland) Bill. We are concerned that this will lead to divergence in regulations between different consenting regimes. We recommend that the broader amendment power, in line with the Natural Environment (Scotland) Bill, should be sought in this Clause. During the passage of the Levelling Up and Regeneration Act 2023, the (previous) UK Government made a commitment to the Scottish Government to reinstate this power, as noted in paragraph 15 of the Scottish Government's Supplementary Legislative Consent Memorandum in respect of that Bill. However, the

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Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 unfortunately only provides new powers for the Scottish Ministers to make Environmental Outcomes Reporting (EOR) regulations under the 2023 Act, rather than re-instating the previous power to amend the existing Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 as had been expected. To address this, the UK Government should extend clause 20 to fully reinstate the Scottish Ministers' power to amend the Electricity Works Regulations 2017. This would enable the regulations to come within the scope of the powers within the Natural Environment (Scotland) Bill, but importantly would not change the devolution settlement or affect the ability of the UK Government to implement a new system of Environmental Outcome Reports in future.

29. **Clause 22 – Benefits for homes near electricity transmission projects:** Clarity and guidance would be welcomed on how the financial benefits will be determined and administered, and who would be responsible for resolving potential disputes regarding residential views. For example, there may be two properties with different aspects of overhead lines, with both receiving the same payment (if the banding is determined by distance alone). We disagree that energy generators should administer the Bill Discount Scheme, which should be the sole power and responsibility of the transmission power.

30. **Clause 23 – Electricity transmission scheme:** We welcome the change. The current 18-month commissioning window does not adequately reflect the time necessary for the developer and the Preferred Bidder (PB) to complete the transfer of transmission assets, particularly as offshore wind farms have become larger and more complex. More significant reforms of the Generator Commissioning Clause (GCC) should be considered, particularly regarding the authority to grant extensions and the removal of this power from primary legislation. The existing extension process is both time-consuming and resource-intensive for the Department for Energy Security and Net Zero (DESNZ), Ofgem and the developer, leading to considerable uncertainty for developers and Preferred Bidders. We see merit in exploring alternative approaches, such as appointing a representative within Ofgem who can proactively engage and manage extension requests in accordance with the DESNZ guidance. However, there are other options we highly recommend considering:
    30.1. Introduce legislation that will simplify the process by which extensions are granted. This could empower Ofgem to grant exemptions to the Greater Commissioning Clause (GCC), provided that certain conditions are fulfilled, or

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continue with DESNZ as the responsible body, but without the need for an extension to the GCC to be laid before parliament.

30.2. The potential inclusion of bonds to incentivise the completion of the tender in a timely manner, or the potential for penalties, such as restrictions on bidding in tender rounds, for Offshore Transmission Owners (OFTOs) who fail to discharge their obligations by the relevant deadline.

31. **Clause 24 – Use of forestry estate for renewable electricity:** We welcome the proposal to amend Section 3 of the Forestry Act 1967 to allow renewable energy projects on forestry land.

Chapter 3: Transport Infrastructure

32. **Clause 42 – Fees for applications for harbour orders:** We welcome the changes.

Part 2: Planning

Chapter 1: Planning decisions

33. **Clause 44 – Fees for planning applications:** We acknowledge the crucial deficit in adequate resourcing within local planning authorities across the UK. However, there are strong concerns from industry that the current implementation of the cost recovery mechanism is not improving or speeding up the process. It is critical that proposals for cost recovery from local planning authorities give industry confidence that they will receive a high-quality and solution-focused service. However, we are concerned that the details, such as what criteria will be applied when setting fees or charges locally, are deferred to regulation. The criteria applied should also be included in the Bill and subject to appropriate scrutiny to ensure that mechanisms are in place to ensure fees remain reasonable. Regarding specific criteria, under paragraph 2(5c)(b), criteria for setting fees should take into account and require performance standards and key performance indicators as part of any charging schedule to ensure that increased fees deliver service improvements and value for money. In addition, it should be clearly set out in the criteria that local planning authorities' consultee inputs should be limited to addressing existing statutory duties and policy requirements (e.g. assessments & evidence to determine compliance with the local plan). Finally, we have concerns about the argument that "nationally set fees do not take into account local variations in costs of running planning application services, leaving many local

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planning authorities experiencing funding shortfalls"[2], as it does not consider, for example, resourcing challenges in the planning system, as outlined under paragraph 58, proposal eight, in this response.

34. **Clause 45 – Training for local planning authorities:** We support the proposal to make this training mandatory for planning committees. Mandatory training should cover the key principles of planning, but there also needs to be a specific focus on renewable energy developments included, in particular, given the hiatus in onshore wind in England. There also needs to be an understanding of the wider programme drivers for renewable development, such as grid connection requirements. We would also recommend that any package of training be regularly reviewed to ensure that committee members receive the most up-to-date information as part of this training, and are informed of updates to policy, guidance and case law. In addition to training for local planning authorities, adequate resourcing for public bodies, including providing relevant expertise to support faster decision making, is essential to support the current and future wind sector development. It is vital that mandatory training also extends to regulators and Statutory Nature Conservation Bodies (SNCBs).

35. **Clause 46 – Delegation of planning decisions:** We support proposals for a national scheme of delegation and believe that this approach would improve certainty for developers when submitting planning applications.

36. **Clause 47 – Spatial development strategies:** More clarity is needed as to how spatial development strategies interact with the Strategic Spatial Energy Plan (SSEP), Regional Energy System Plans (RESPS), Defra's Land Use Framework and other strategic plans – in particular in terms of delivery bodies' timings and outputs. There is no clear requirement for spatial development strategies to be in conformity with, or have regard to, strategic plans as per the duty upon National Energy System Operator (NESO) through clause 13. We therefore recommend the extension of clause 13 to include strategic planning authorities and to add a requirement for spatial development strategies to conform with relevant strategic plans and national policies overall. We are concerned that the requirement for spatial development strategies only to consider infrastructure deemed of strategic importance for mitigating or adapting to climate change is left to strategic planning authorities to define. This could lead to weak and inconsistent approaches. Local Planning Authorities could

[2] Planning and Infrastructure Bill: Explanatory Notes, Clause 44.

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decide that their area does not or should not have infrastructure of strategic importance for climate change and therefore discharge this requirement without undertaking any strategic planning for climate change/energy within a spatial development strategy. We therefore recommend that the wording of this requirement be tightened, including the requirement for spatial development strategies to include a strategy that maximises the potential of the area to contribute to climate change mitigation and adaptation.

Part 3: Development and nature recovery

37. **Clause 49 – Overview of EDPs:** We support the approach to deliver a more strategic approach to environmental mitigation and/or compensation for onshore developments and welcome the potential that the proposed changes have to unblock major energy infrastructure and provide holistic and strategic solutions to protected sites and their conservation objectives. For Environmental Delivery Plans and to be impactful, the following aspects should be considered and addressed in the Bill:
    - **37.1.** Our key concern is the level of resourcing of Natural England and other bodies to deliver the Environment Delivery Plans, which could cause significant delays to their adoption. With resources being reduced, it is unclear how they can support the wide use of the Nature Restoration Fund.
    - **37.2.** It is essential that the Nature Restoration Fund aligns with existing mechanisms in development, such as the Marine Recovery Fund. It's important that synergies are realised wherever possible, e.g. the ability to pay into one fund to meet multiple regulatory requirements.
    - **37.3.** The fund must be as flexible as possible, providing for a range of measures, including those focusing on ecosystem functionality and resilience as a whole. Payments into the fund should immediately discharge planning conditions and allow works to commence to prevent delays in project programmes. It will also be vitally important to have sufficient resourcing to collect adequate baseline data to justify higher rates for greater impacts.
    - **37.4.** It will be essential to learn lessons from setting up the Marine Recovery Fund (e.g., the ongoing process of setting up the fund and developing measures for the library). While we strongly urge the Government to progress with the implementation of the Marine Recovery Fund, there is a greater opportunity to align both funds and to extend the Nature Restoration Fund beyond twelve nautical miles.
    - **37.5.** More clarity is needed regarding Biodiversity Net Gain and how it will align or be potentially incorporated in the long term. A fund that covers both Biodiversity

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Net Gain and other environmental obligations would be more straightforward, could lead to better outcomes for biodiversity, and support streamlining planning consent.

37.6. We are concerned about the divergence between Environmental Delivery Plans due to the varied spatial areas that such plans are likely to cover. Further information on the type and scope of developments that will or will not be included in Environmental Delivery Plans should be clearly set out.

38. Clause 50 – Environmental features, environmental impacts and conservation measures: We are concerned that the scope of "the environmental features that are likely to be negatively affected by the development" is framed too vaguely and will not cover all features an individual development may affect. This dual process would lead to requirements to fulfil existing requirements alongside complying with the new system, which may lead to complicating, not streamlining, the consenting process and the risk of a two-tier system. We therefore recommend that this clause set out:

38.1. How specific environmental impacts on relevant environmental features will be identified and assessed, or what scrutiny this may be afforded and what approach will be taken in cases where environmental features are classified as irreplaceable habitats.

38.2. We are concerned about the uncertainty as to whether environmental delivery plans could either weaken or strengthen current tests applied through habitats regulations assessments (such as Likely Significant Effect or Adverse Effect on Site Integrity) and lead to an inconsistent application. Considering Natural England's current approach to the Precautionary Principle, the wording risks broadening the range of features that may require assessment and mitigation. Subsection 4 outlines Defra's "almost like-for-like" policy for mitigation and compensation, which we have previously highlighted as overly rigid and narrow. We are concerned that this section would enable the delivery body to focus conservation measures on an environmental feature that is not being directly affected, as long as it is the same type of feature as the one being impacted. To avoid disproportionately onerous mitigation requirements, more clarity is required to specify how the level of protection to environmental features should be secured through conservation measures. We recommend that the scope of environmental features should only include those "likely to experience adverse effects on their integrity or conservation status."

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39. **Clause 51 – Nature restoration levy, charging schedule:** A consultation should be undertaken on the regulations related to the setting of levy rates.

40. **Clause 52 – Other requirements for an EDP:** The requirement for an Environment Development Plan to distinguish between conservation measures (subject to levy) and "any other measures being taken or are likely to be taken by Natural England or another public authority" raises additionality concerns in terms of potentially restricting the scope of eligible 'new' conservation measures as being only over and above 'baseline' measures that could or should be deployed by Natural England regardless. This could artificially limit the number of available conservation measures and thus the capacity of Environmental Delivery Plans to address predicted impacts. The development of Environmental Delivery Plans and the permitted scope of conservation measures included within these should recognise fundamental differences between habitats, which can relatively easily be monitored and managed, with mobile species which cannot, as well as between direct and indirect impacts on identified environmental features. A realistic and pragmatic framing of additionality and a broad interpretation of eligible conservation measures should be adopted. For mobile species, given additional complexities, including uncertainties with respect to indirect effects on behaviours and challenges in monitoring population changes over non-localised geographical areas, the scope of permitted measures should include indirect measures aimed at improving ecosystem resilience to protect and benefit relevant environmental features.

41. **Clause 53 - Preparation of EDP by Natural England:** We recommend amending this clause to require Natural England to have regard to all designated strategic plans (as per this Bill's clause 13) and statutory development plans (i.e. including Local Plans) when preparing an Environmental Delivery Plan.

42. **Clause 54 – Consultation on draft EDP:** We are concerned that the 28-day fixed time limit on draft Environmental Delivery Plan consultation may be insufficient due to its scope and complexity (e.g. if multiple environmental features or a wide area are covered). We would recommend amending clause 53 and extending the period to 42 days (six weeks) with the power to vary the time limit when Natural England notifies the Secretary of State of the intention to prepare an Environmental Delivery Plan.

43. **Clause 55 – Making of EDP by Secretary of State:** With regard to the making of an Environmental Delivery Plan, we would like to put forward the following considerations:

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43.1. It is important to consider at this stage that the Plans would need to be 'live' documents, to allow for the consideration of the narrowing of design envelopes as renewable energy projects move through the consenting process.

43.2. More clarity is required on how the plans will be monitored and subsequently kept up to date, and how upcoming development will be considered once it has been signed off by the Secretary of State.

43.3. We have concerns over the power of a Secretary of State to annul Environmental Delivery Plans.

43.4. Environmental Delivery Plans should not include areas allocated for energy development in local plans or land owned by those who hold an electricity licence under Section 6(1) of the Electricity Act 1989.

43.5. To avoid a separation between other measures and 'new' conservation measures, the clause should be amended to clarify that the overall improvement test should fully consider any other measures being taken or likely to be taken by Natural England or another public body alongside the 'new conservation measures' when considering whether the test is met.

43.6. The Bill currently lacks a clear Environmental Delivery Plan assessment framework, including what evidence a plan must contain or be accompanied by to demonstrate compliance with the overall improvement test. Details or requirements for regulation should be set out in the Bill.

43.7. We recommend adding an additional requirement for Natural England to outline how issues raised within a draft Environmental Delivery Plan have been considered.

44. Clause 61 – Commitment to pay the nature restoration levy: Further information will be required regarding the funding mechanism and level of costs for industry. If the Nature Restoration Fund is to be used as a wider mechanism for strategic action, further clarity is needed regarding:

44.1. The calculation methods to ensure that the levy offers good value for money. More clarity is required to confirm whether, once a developer has paid into the Nature Restoration Fund, construction can begin immediately.

44.2. We are furthermore concerned that the nature restoration levy may impact the market mechanisms underpinning Biodiversity Net Gain by affecting demand/supply in the markets for statutory Biodiversity Net Gain credits and units through habitat banks. There would also need to be certainty that the funds would be ringfenced for actions for nature restoration, and more specifically for the relevant Delivery Plan.

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44.3. Without clarity regarding an assessment framework or what evidence should underpin a robust Environmental Delivery Plan (including for likely impacts, selection of conservation measures and charging schedule), the provision in subsection 4 to mandate payment to Natural England of the nature restoration levy and remove existing assessment options for complying with relevant environmental obligations is disproportionate and cannot be supported by industry. We recommend either removing or revising subsection 4 to remove the mandatory nature of levy payments and permit existing assessment options for compliance. Alternatively, the requirement for Natural England to justify mandating levy payments should be strengthened, and it should be subject to a determination by the Secretary of State.

45. **Clause 62 – Regulations about the nature restoration levy:** We recommend that the wording "must aim to ensure" should be replaced with "must ensure" to avoid applicants being required to pay unviable costs.

46. **Clause 66 – Use of nature restoration levy:** We have potential additionality concerns under the limitation imposed on Natural England to only spend levy monies on "conservation measures that relate to the environmental feature" whilst an Environmental Delivery Plan can also set out other measures.

47. **Clause 67 – Collection of nature restoration levy:** We are concerned about the powers for regulations to impose conditions mandating levy payments. The clause should be amended to clarify that levy payments should only be mandated when an application has elected to use an Environmental Delivery Plan to discharge relevant environmental obligations.

48. **Clause 70 – Guidance about the nature restoration levy:** This clause does not yet confirm the minimum required scope of guidance from the Secretary of State to the relevant authority. The clause should specify the minimum scope of any guidance and should include the charging schedule development and consultation, selection of conservation measures for inclusion within the levy, costing methodology and cost apportionment methodology.

49. **Schedule 6 Part 1 – Ramsar sites:** The requirement in subsection ten for any necessary compensatory measures to "protect the overall coherence of the national Ramsar site series" would exacerbate existing problems selecting and securing relevant

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compensation measures under the Habitats Regulations. We recommend revising the clause to remove reference to protecting the overall coherence of the site series. Instead, align with any new test introduced through the Energy Act secondary legislation.

50. **Clause 86 – General vesting declarations:** We also support the removal of newspaper notices and the acceptance of electronic ones.

51. **Additional proposals and comments to the Planning and Infrastructure Bill:** We see a potential for the Bill to go beyond its current remit and would like to propose the following amendments and for the Committee to also consider challenges behind the Bill that will be critical for the successful implementation of the legislative changes brought forward in the Planning and Infrastructure Bill.

52. **Proposal 1 – Habitats Regulations Assessments (HRA) [Annex A]:** There is a significant opportunity to make the Bill even more impactful by implementing crucial changes to the Habitats Regime. These changes will support the Government's renewable energy and infrastructure targets, while maintaining essential environmental safeguards. To achieve the Clean Power 2030 Mission, we must deliver 43-50 GW of offshore wind, 27-29 GW of onshore wind, and develop fit-for-purpose grid infrastructure. The current approach to the Habitats Regime is overly complex and is delaying vital offshore wind projects. Streamlining this regime is essential for meeting the Clean Power 2030 goals. Examples of its inefficiencies are outlined in Annex A. We endorse the recommendations in the proposal paper "Creating a Habitats Regime That Works for Major Infrastructure" by Catherine Howard, Partner and Head of Planning at Herbert Smith Freehill - Annex A. These are summarised as:
    - **52.1.** Allow mitigation measures in Stage 1 Screening to determine significant project effects (People Over Wind case).
    - **52.2.** Remove the rule that any habitat loss affects integrity (Sweetman No 1 case).
    - **52.3.** Eliminate the need for post-consent Habitats assessments for conditions if initial consent included or screened out such assessments (CG Fry case).
    - **52.4.** Require Statutory Nature Conservation Bodies (SNCBs) to follow statutory guidance on key interpretations like the precautionary principle and very small (de minimis) impacts. New robust guidance to support decision makers on these points is required to maximise benefits

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53. **Proposal 2 – Eskdalemuir [Annex C]:** Unlocking the 3-6GW of onshore wind capacity proposed within the consultation zone of the Eskdalemuir Seismic Array (Array) is crucial to achieving the Clean Power 2030 mission. The goal is to both protect the Array and the national security purpose it serves as well as optimising renewable energy development around the array. To do both, the Ministry of Defence (MOD) requires that the seismic impact limit (SIL) required to unlock onshore wind capacity be put into law rather than simply applied by policy. The SIL can be regulated under the Planning Acts for Town and Country Planning applications. But for S36 applications, an amendment to the Electricity Act is required. We recommend amending Clause 14 of this Bill to include the following: '*Restrictions on the grant of consent, either indefinitely or during such period as may be specified in the regulation, in respect of any development as may be so specified'.* This change will mirror the language in Regulation 32 of The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013. (See Annex C for more information about the Array and the implications of this amendment for unlocking onshore wind in the consultation zone.)

54. **Proposal 3 – Securing land rights in Scotland:** The Bill provides an opportunity to provide renewable developers with the ability to secure land rights in Scotland. Currently, developers are required to create leases individually with landowners for oversail and overrun rights. As land becomes scarcer for renewable energy developments, projects can have as many as fifty leases for oversail and overrun. Landowners have begun holding developers to ransom for payments that the proposed projects can't financially support. These negotiations are putting projects at risk. Currently, the only solution for developers is a compulsory purchase order, which is not fit for purpose for this application. It is too blunt a tool and would give the developer who uses it full land rights, when multiple developers will likely need access to those same pinch points. We recommend the creation of a new provision allowing developers to apply to Scottish Ministers for short-term oversail and overrun wayleave rights when required, during the construction process and for any repairs during the lifetime of the wind farm. This should be subject to compensation payment and land reinstatement after use. Compensation should be determined on a statutory basis. Because of the need to deploy renewable energy projects quickly, we suggest removing any time-bound requirement for negotiations and requirement that negotiations have been done with landowners.

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55. **Proposal 4 – New Reporter Led Process for public local inquiry:** Schedule 8, paragraph 3.2 of the Electricity Act (1989) should be updated to continue allow the Secretary of State to determine if a public local inquiry is required but create a truncated approach instead of a mandatory inquiry if the Secretary of State elects to move forward with it. The same language around a reporter-led process that the Bill applies to local planning authorities should be applied to other statutory consultees here.

56. **Proposal 5 - Abnormal loads:** The Road Traffic Act (1988) must be updated to allow for traffic officers, not just Police Scotland, powers to stop traffic in Scotland, including on the local road network and trunk roads. It must broaden the application of criminal offences to powers of traffic officers. Powers should be given to Scottish Ministers to allow other designated individuals outside of Transport Scotland or Police Scotland employees these powers, so that contractors can be used to provide traffic officers. In addition, the Police Reform Act (2002) should be applied to Scotland to allow Police Scotland to enter into any arrangements with any employer for the carrying out of community safety functions.

57. **Proposal 6 – Lifetime extension Offshore Transmission Owner (OFTO):** Whilst significant progress has been made in creating End of Tender Revenue Schemes (EoTRS) frameworks for lifetime extension, it is important that effective policy, regulation, and guidance are delivered quickly and efficiently to avoid the Offshore Transmission Owner (OFTO) regime acting as a blocker to lifetime extension and repowering of offshore wind farms. We therefore recommend that Ofgem and the Department for Energy and Net Zero (DESNZ) proactively consider altering legislation to allow the option for generator-ownership of transmission assets for life extension periods, which would solve a number of the issues surrounding the regime. According to RenewableUK Energy Pulse, over one-third of the UK's offshore wind farms will reach the end of their originally anticipated operational design life by 2035 and will have to be decommissioned should lifetime extension not be pursued.

58. **Proposal 7 – Resourcing for relevant government departments, local authorities and statutory consultees:** Implementing the changes being brought forward by the Bill without sufficient resourcing of statutory consultees will hamper their success. Resourcing is already being squeezed, and the Bill asks for further functions of NE (e.g. EDP delivery) and statutory consultees working better to reduce areas of disagreement pre-application. Appropriate resourcing for relevant government

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departments, local authorities and statutory consultees, including upskilling and retention of personnel, will be critical to meet the demand in casework to deliver renewable energy projects at pace and to prevent unnecessary consenting delays. However, resource constraints within Statutory Nature Conservation Bodies (SNCBs) and Local Planning Authorities have been linked to delays within the current planning and consenting regime and are recognised as a key barrier to the timely delivery of projects. Organisations that are particularly resource-constrained in England include Natural England, the Joint Nature Conservation Committee (JNCC), the Marine Management Organisation (MMO), Natural Resources Wales, and the Department of Agriculture, Environment and Rural Affairs of Northern Ireland (DAERA). In Scotland they include NatureScot, Historic Environment Scotland and the Scottish Environmental Protection Agency. For the proposal put forward in this Bill to be effective, in particular with regard to the Nature Recovery Fund, appropriate resourcing needs to be in place. More clarity from the UK Government, Scottish Government and relevant departments about the exact plans will be urgently required.

59. **Proposal 8 – Engagement from statutory consultees and local planning authorities:** Consistent feedback we receive from developers is the difficulty in engaging with and receiving input from key consultees, including Natural England and the Marine Management Organisation. The same is true for statutory consultees in Scotland. Therefore, we recommend providing clear guidance on expectations for statutory consultees and ensuring greater accountability for their role in the process will be key to avoiding unnecessary delays from both the UK Government and the Scottish Government. That should include clear and defined timeframes for responses and expectations for statutory consultees and local planning authorities. One of the key challenges in the current system is the lack of certainty around when consultees will provide substantive input. Delays in engagement can result in unresolved issues being carried into the examination phase, increasing costs and prolonging decision-making. In Scotland, delays in statutory consultee feedback will cause indefinite delays in proposals being accepted by the Energy Consents Unit. We would therefore support introducing defined response times for consultees. Additionally, there needs to be clear guidance on what happens if consultees, local planning authorities or other stakeholders fail to engage.

60. **Proposal 9 – Certainty over timescales:** Increasing certainty over timescales across the planning process is vital to the delivery of a faster and less costly NSIP regime. A return to existing statutory timescales for application determination, including

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strengthening pre-application and Examination phases to limit the need for post-examination procedures to be undertaken by the Secretary of State prior to the determination of applications, is needed. It is worth noting that no offshore wind farm in recent years has been determined within statutory timescales. We therefore recommend that:

60.1. The focus should be on returning to existing NSIP statutory timescales for application determination, including by strengthening examination and recommendation stages. Reforms should seek to limit the need for post-examination procedures to be undertaken by the Secretary of State prior to the determination of applications.

60.2. To avoid delays to construction activities and maintenance of operational offshore wind farms, it is also necessary to speed up the post-consent decision-making for the discharge of deemed marine licence (dML) conditions and DCO requirements. This could include setting firmer statutory timeframes to discharge conditions and avoiding further consultation on issues already addressed through the Examination process and in consented DCOs.

60.3. It is important that these changes are supported by strengthened guidance. Any new guidance should be subject to consultation with industry to ensure it is clear, fit for purpose and avoids unintended consequences.

61. **Proposal 10 – Examination reports:** It is important to frontload meaningful engagement between parties and promote early resolution of issues wherever possible. We therefore recommend a further change relating to the submission of examination reports. The Infrastructure Planning (Examination Procedure) Rules 2010 (rule 19 - Procedure after completion of examination) should be amended to require examining authorities, when submitting their examination report to the Secretary of State, to publicly:
a) state whether, in the view of the Examining Authority, there is sufficient information to allow the Secretary of State to proceed to make a final determination; and,
b) publish a register of unresolved objections at this point.
This would provide an incentive for parties to resolve issues during the examination and provide a transparent indication of when determinations may need to be delayed due to unresolved issues. It will not always be possible for parties to resolve issues, including due to fundamental differences in their respective interests and positions, but where this is the case, then it should be identified during the examination stage to allow the Secretary of State to take account of these matters.

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ANNEX A: Habitats Regulations Assessment

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Delivered via email: scrutiny@parliament.uk
cc: Minister Matthew Pennycook
Minister Michael Shanks

25th April 2025

Dear Planning and Infrastructure Bill Committee,

RenewableUK Response: Planning and Infrastructure Bill Call for Evidence – Enabling Development through Amendments to the Habitats Regime

RenewableUK (RUK) members are building our future energy system, powered by clean electricity. We bring them together to deliver that future faster; a future which is better for industry, billpayers, and the environment. We support over 500 member companies to ensure increasing amounts of renewable electricity are deployed across the UK and access markets to export all over the world. Our members are business leaders, technology innovators, and expert thinkers from across industry.

We welcome the Planning and Infrastructure Bill and believe there is a significant opportunity to make the Bill even more impactful by implementing crucial changes to the Habitats Regime. These changes will support the Government's growth agenda, and renewable energy and infrastructure targets while maintaining important environmental safeguards.

To achieve the Clean Power 2030 Mission, together, industry and government need to deliver 43-50 GW of offshore wind, 27-29 GW of onshore wind, and develop fit-for-purpose grid infrastructure.

The approach to the Habitats Regime has become overly complex and inefficient, leading to delays in consenting and deployment of renewable projects. For example, Habitats Regulations Assessment (HRA) documents submitted to regulators are often hundreds of pages long, the Dogger Bank South Offshore Wind project HRA document is over 1000 pages. Making the Habitats Regime more proportionate is essential for meeting the Clean Power 2030 goals. Examples of its inefficiencies are set out in Annex A (1).

We, therefore, endorse the recommendations in the proposal paper "**Creating a Habitats Regime That Works for Major Infrastructure**" by Catherine Howard, Partner

and Head of Planning at Herbert Smith Freehill – included in Annex A (2). These are summarised as follows:

Legislative Amendments via the Bill:

1. Allow mitigation measures in Stage 1 Screening to determine significant project effects (People Over Wind case).
2. Remove the rule that any habitat loss affects integrity (Sweetman No 1 case).
3. Eliminate the need for post-consent Habitats assessments for conditions if initial consent included or screened out such assessments (CG Fry case).
4. Require Statutory Nature Conservation Bodies (SNCBs) to follow statutory guidance on key interpretations like the precautionary principle and very small (de minimis) impacts. New robust guidance to support decision makers on these points is required to maximise benefits.

Including Offshore Wind Projects in the Bill's Proposed Environmental Delivery Plans (EDP):

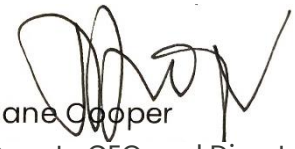
- Extend EDP scope to the UK Economic Exclusion Zone (beyond 12nm) for offshore wind projects and empower the Joint Nature Conservation Committee to make EDPs.

These amendments will significantly improve the Habitats Regime and facilitate renewable and infrastructure deployment while preserving environmental protection, aligning with the Bill's purpose.

We look forward to your consideration of these points through the Bill Committee and working with you on their implementation. We'd be happy to meet with you to discuss these proposals in detail.

If you would like to discuss this further, please do not hesitate to contact Friederike Andres via Friederike.Andres@renewableuk.com.

Yours sincerely,



Jane Cooper
Deputy CEO and Director of Offshore Wind
RenewableUK

Annex A (1) – Habitats Regime inefficiencies examples from the renewables industry

1. **A pragmatic and proportionate approach to small (de minimis) impacts from offshore wind development**

Example 1: Rampion 2 offshore wind farm was advised by Natural England that it is not possible to rule out an Adverse Effect on Integrity (AEoI) on the kittiwake feature of the Flamborough and Filey Coast SPA, in combination with other plans and projects, for a contribution of 0.72 kittiwake mortalities per year and will require a derogation and compensation under the Habitats Regime [1].

Example 2: Two offshore wind developers have been advised by Natural England that **any** placement of rock scour on operational projects within a Marine Protected Area (MPA), beyond current scour pads, will trigger an AEoI and require a derogation and compensation under the Habitats Regime.

2. **Enabling consideration of mitigation earlier in the Habitats Regulations Assessment (HRA) process.**

As a result of the decision of the CJEU in Case C-323/17 ***People Over Wind & Sweetman v Coillte Teoranta*** EU:C:2018:244, a case regarding works necessary to lay a cable connecting a wind farm to the electricity grid in Ireland, it is no longer possible to screen out projects from further assessment because mitigation can no longer be considered at this stage. The result of this is to increase the resource requirement for developers, Statutory Nature Conservation Bodies (SNCBs) and regulators in an already very resource constrained system, by going through the Appropriate Assessment process for a wide range of impacts where it is highly unlikely a derogation case or compensation will be required.

[1] Rampion 2 Kittiwake Compensation Implementation and Monitoring Plan EN010117-001693-8.64 Kittiwake Implementation and Monitoring Plan (clean).pdf

Annex A(2) – Delays affecting offshore wind project consenting and construction due to Habitats Regulations challenges

Project	*Megawatts (MW)*	*Country*	*Delay duration (days)*	*Current status**	*Phase affected by delay*	*Reason for delay*
Hornsea Project Three	2955	England	456	Onshore construction	Consent decision	Seabird and seafloor HRA compensation issues
Norfolk Vanguard	2760	England	590 (SoS decision stage only)	Consented	Consent decision, construction	Decision quashed (for cumulative onshore impact reasons) and redecided, HRA challenges introduced in second decision, and seafloor compensation blocked Financial Investment Decision (FID) and construction
Norfolk Boreas	1380	England	242 (SoS decision stage only)	Consented	Consent decision, construction	HRA issues with benthic compensation blocked FID and construction
East Anglia TWO	964	England	84	Pre-construction	Consent decision	Seabird HRA issues
East Anglia ONE North	900	England	84	Pre-construction	Consent decision	Seabird HRA issues
Hornsea Project Four	2600	England	140	Pre-construction	Consent decision	Seabird HRA issues
Dudgeon Extension	402	England	275	Consented	Consent decision	Range of HRA issues
Sheringham Shoal Extension	317	England	275	Consented	Consent decision	Range of HRA issues
Berwick Bank	4100	Scotland	682+	In determination	Consent decision - undecided	Seabird compensation

Project	*Megawatts (MW)*	*Country*	*Delay duration (days)*	*Current status**	*Phase affected by delay*	*Reason for delay*
Green Volt	560	Scotland	580	Consented	Consent decision	Unknown, likely seabird compensation
West of Orkney	2000	Scotland	322+	In determination	Consent decision	Unknown, likely seabird compensation
Rampion 2	1200	England	57	Consented	Consent decision	HRA issues – noise and fish spawning
Muir Mhor	798	Scotland	71+	In determination	Consent decision - undecided	Unknown – likely seabird compensation
Ossian	3600	Scotland	31+	In determination	Consent decision - undecided	Unknown – likely seabird compensation
Dogger Bank South – West & East	3000	England	84	In determination	Pre-examination	Seabird and seafloor HRA compensation issues

* Current status at end April 2025

HERBERT SMITH FREEHILLS

24 April 2025

CREATING A HABITATS REGIME THAT WORKS FOR MAJOR INFRASTRUCTURE

By Catherine Howard, Partner and Head of Planning

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1. INTRODUCTION

1.1 I have written previously about why the Habitat Regulations are such a challenge for developers and a pro-growth Government: [Bat Shed Crazy]. I also discussed the Government's Working Paper on Nature Recovery, where I guessed that the Government would feel limited in what it could achieve in the Planning and Infrastructure Bill to address Habitats [Wishful Thinking].

1.2 Since I published these articles, two things have happened: (i) the Government has brought out details of how strategic compensation might work for offshore wind projects; and (ii) The Planning and Infrastructure Bill (or 'Bill') has put forward 'environmental delivery plans' ('EDPs') as a way to deliver 'strategic compensation' onshore.

1.3 As I explain in Part One below, the two approaches are very different. The latter is much more radical than the former. Neither, however, offers a regime that will avoid the need for expensive compensation packages for one-off projects (like the HS2's bat shed), which simply are not good value for developers or nature. This is something that environmental NGOs are now recognising as much as developers.

1.4 I have therefore given more thought to how we navigate the Habitats regime to achieve what Government, developers and green groups all broadly want.

1.5 Some limited amendments to the Habitats regime are required, but much is best achieved via new guidance to the statutory nature conservation bodies ('SNCBs') clarifying the way in which key principles of the existing regime should (and should not) be applied. This doesn't sound dramatic, but that's really the point. Often, and certainly in this case, the best changes are the simplest. The package of measures I propose in Part One would be highly effective in creating a more proportionate approach for all major projects.

1.6 Part Two sets out the specific drafting changes that could be made to the Habitats Regulations to implement the legislative reforms proposed. Reference is made to the legal vehicles that could be used to make these changes.

1.7 The Corry Review of DEFRA's regulatory functions could not be better timed to invite the sort of changes I am suggesting. My hope is we can get the provisions we need into the Bill. Government can work on the guidance needed in parallel, and should do so with input from developers.

PART ONE

THE NEED FOR A REGIME THAT WORKS FOR MAJOR INFRASTRUCTURE

2. STRATEGIC COMPENSATION FOR OFFSHORE WIND – STICKING WITHIN THE RULES

2.1 In January, the Government brought out interim guidance on how strategic compensation and the related "Marine Recovery Fund" is intended to work for the offshore wind industry. The genesis of this attempt to fix the Habitats problem (for the offshore wind industry only)

was the Energy Act 2023. That Act empowered the Secretary of State to make apparently sweeping changes to the Habitat regime via secondary legislation. That legislation has yet to be published. However, the interim guidance gives us some insight into how far it may go. As I predicted, it is not particularly helpful.

2.2 Essentially, it applies the existing rules but says that if the Government happens to have created a strategic compensation project which deals with exactly the Habitats problem that the applicant for a particular offshore wind project is coming up against, then that applicant can pay some money into a fund, rather than having to put forward bespoke compensation for its own project. In theory, this is efficient and will lead to economies of scale (eg one big artificial nesting site for kittiwakes to cover multiple projects rather than each project having to build its own).

2.3 In practice, however, it will be of no use to most of the offshore wind schemes in the pipeline. The guidance makes clear that unless such a scheme exists at the time of the application, and is confirmed by the SNCBs as adequate to address impacts at the time they will occur, it's of no use. The developer must instead propose its own bespoke compensation under the Habitats regime, as they do currently. Given that it could take years for Government to design and build such compensation schemes, this is going to be of limited use for the current crop of projects. By the time such strategic compensation is in place, there are likely to be relatively few further offshore wind projects to be consented around the UK.

2.4 In addition, two key points:

2.4.1 Firstly, there simply is not enough like-for-like compensation that could be created to offset the impacts on particular seabirds caused by the proposed 43-50GW of offshore wind that the Government aspires to by 2030. There is therefore an urgent need to take a less restrictive interpretation of what can constitute 'compensation' under the Habitats regime.

2.4.2 Secondly, the current requirement for like-for-like compensation is leading to vast amounts of money being paid to help breed relatively small numbers of kittiwakes (a type of seagull). The £300-400m that developers of wind farms in the North Sea are collectively having to commit to compensation measures including artificial nesting structures for these birds would be much better used by the RSPB to implement a wider seabirds strategy in the UK.

3. STRATEGIC COMPENSATION ONSHORE – BREAKING THE RULES

3.1 The scheme the Government proposes to deal with Habitats problems onshore is very different. I was quite wrong in my prediction on this one. I assumed that it would adopt the same sort of approach as offshore wind ie sticking within the existing rules but just applying the principles of the regime to collective compensation schemes. I expected that like the Energy Act 2023 it might defer the detail of how it would work for secondary legislation.

3.2 The provisions set out in the Planning and Infrastructure Bill are, in fact, much more detailed and radical than this. In big picture terms, the Bill appears to set up a 'pay and forget' model. Provided Natural England has plans for an EDP covering a particular impact (eg nutrient pollution of a river) then developers coming forward with proposals in the relevant area no longer have to carry out Habitats assessments or obtain licences in relation to that impact. They can pay into the fund covering that EDP and are deemed to have the necessary Habitats and species licences they need, subject to generic conditions. It does not appear to matter whether the EDP has been implemented, as long as the plan exists and has been

adopted by the Secretary of State after the necessary consultation. All of this breaks current regulatory moulds.

3.3 There are lots of questions being asked about how this will work in practice. This kind of pro-active role, delivering compensation projects, will be new for Natural England. They'll need the right staff to be recruited to do it (those used to developing projects). There will also need to be lots of forward funding by Government before developer payments start coming onstream. It will clearly take some time to get EDPs adopted from today's standing start.

3.4 The purpose of this article is not, however, to critique the Bill's approach to strategic compensation as it might apply to housing projects (its most obvious target), but rather: (i) to suggest why we need a different approach for one-off energy and infrastructure projects and (ii) to offer a view on what that approach might be.

4. ONE-OFF ENERGY AND INFRASTRUCTURE PROJECTS - STILL FACE A HABITATS PROBLEM

4.1 What I was right about in my previous articles was that the Bill's approach is most obviously applicable to the nutrient neutrality problem currently blocking much housing development: a single (known) impact in a given area (nutrient pollution of a particular water basin) contributed to by multiple developers. You can see the sense in developers clubbing together to give money to a Government entity to provide a compensation solution, which is funded by the relevant developers in the affected area[1].

4.2 It is much more difficult to see how the whole concept of strategic compensation works where a single project is brought forward which is creating a Habitats problem. By the time a developer comes along with a project and identifies a Habitats problem, there is unlikely to be sufficient time for Natural England to put in place an EDP before that developer wishes to make its consent application. Developers would therefore need to twin-track the EDP process with going through the traditional Habitats assessment process themselves (including identifying their own compensation). This is unlikely to be seen as attractive or worthwhile to most developers.

4.3 In addition, in such cases there is no economy of scale to be had by Natural England putting in place an EDP. Where a single developer would be the sole beneficiary, that developer would presumably have to bear the whole cost.

4.4 So, while the Bill does refer to EDPs being capable of being put in place for nationally significant infrastructure projects under the Planning Act 2008, I don't really see that working. Nor would it for major projects promoted under other regimes.

4.5 What we therefore need for such projects is to make the existing Habitats regime more workable and proportionate, in line with the spirit of the Corry Review's recommendations.

5. PROPOSED FIXES WHICH WOULD ASSIST ALL PROJECTS

5.1 The table in section 10 looks at the three stages of Habitats assessment, the problems experienced at each stage, and how we might address those problems. Stages 1, 2 and 3 act as a funnel through which applications proceed, stopping at a given stage if the relevant

[1] As an aside, worth noting however that a big cause of nutrient pollution isn't developers at all but the run-off from agriculture into rivers. I haven't heard that farmers will be asked to pay into the EDPs.

tests are satisfied. Therefore, the more of the fixes we implement for the earlier stages, the less projects will need to go through the subsequent stages at all.

5.2 The overall objective of these changes is to find a reasonable and proportionate way to:

5.2.1 Reduce the number of projects which are 'screened in' at Stage 1, and therefore need to undergo a full (Stage 2) assessment;

5.2.2 Reduce the number of projects deemed to fail Stage 2 assessment on grounds that they risk causing an 'adverse effect on integrity' of a protected site;

5.2.3 For projects which are held to be at risk of causing an adverse effect on integrity (and therefore must undergo Stage 3 assessment) ensure that the level and type of compensation measures required are reasonable and proportionate. This will deliver the best value for nature using the developer's money; and

5.2.4 For consented projects which have undergone Habitats assessment, or were screened out from having to carry it out, ensure there is no risk of having to carry out such an assessment subsequently (during the construction or operational phase). It is unreasonable for developers to have to carry this risk forward, and there is a danger that this begins to undermine investor confidence.

5.3 Sections 6 and 7 elaborate upon the specific problems which need to be addressed via legislation (section 6) and guidance (section 7) to achieve these objectives.

5.4 I am suggesting this packages of measures primarily because we need something that works for one-off energy and infrastructure projects. However, these changes would apply to all development, including housing. Given that EDPs might take longer and be more difficult and costly to get in place than Government anticipates, I hope my proposals will be supported equally by those whose primary focus is expediting housing.

6. WHY SOME OF MY PROPOSALS REQUIRE LEGISLATION

6.1 There are three key cases which have made the Habitats regime much more unwieldy. These are the EU's *People Over Wind & Sweetman v Coillte Teoranta case* (EU:C:2018:244) of 2018; the EU's *Sweetman (No 1) case*; and the *CG Fry case* currently awaiting determination by our Supreme Court.

6.2 Under the European Union (Withdrawal) Act 2018, our Court of Appeal and Supreme Court may deviate from EU case law, but lower courts may not. In any case, in practice the Court of Appeal and Supreme Court have been reluctant to deviate from the EU's interpretation of European-derived law (such as the Habitat Regulations). In order to over-ride the unhelpful effects of these three cases, the Government therefore needs to legislate. The only constraint on the Government legislating in this way would be considerations around whether this would constitute environmental 'regression' of the current law or breach the post-Brexit Trade and Co-operation Agreement ('TCA'). I consider these issues in section 9, but first I explain in this section the impact of these three cases.

People Over Wind

6.3 The *People Over Wind case* held that mitigation measures cannot be taken into account at the screening stage (Stage 1) of the Habitats process. This leads to much philosophical debate between the SNCBS and developers about what counts as 'mitigation' as opposed to merely an integral part of a project's design, but the upshot is that far more projects now have to undertake full (Stage 2) Habitats assessment than prior to this 2017 case. This is because if you discount measures the developer intends to use to mitigate the impacts of

their project then of course more will be deemed to be at risk of giving rise to a 'likely significant effect' (the gateway test for having to do Stage 2 assessment). Stepping back, it is surely a nonsense not to allow mitigation measures to be taken into account at the screening stage. It means the screening test is being applied against a wholly artificial version of the project.

6.4 This might matter less if, once in Stage 2 (full) assessment, the SNCBs didn't take such a precautionary approach, ruling that even de minimis effects count as having an 'adverse effect on integrity'. As it is, the People Over Wind case combined with SNCB's approach at Stage 2 leaves developer whose projects will cause only de minimis impacts having to go through Stage 3 assessment and find compensation. By reversing People Over Wind via legislation, we would stop this cascade effect.

6.5 Prior to People Over Wind, UK judges were very clear in holding that mitigation should be taken into account at the screening stage. Sullivan J held in R (Hart DC) v SSCLG [2008] that "*it would have been "ludicrous"... to disaggregate the different elements of the package and require an appropriate assessment…"* and noted "*the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course*…" This view was approved in a number of subsequent judgements of UK courts. We need to get back to this more sensible approach. It offered a good level of protection because, as was stated in *Hart*, if the decision-maker does not agree with the applicant's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then they would require Stage 2 assessment because without this they would not be able to exclude the risk of a significant effect.

Sweetman (No 1)

6.6 Protected habitats are designated as such on the basis of 'conservation objectives'. In some cases, these will be the preservation of particular species or collections of species. In other cases, the conservation of the natural habitat type is itself the objective that justified the designation – such was the case addressed in *Sweetman (No 1).* A proposed road scheme would have resulted in the permanent and irreparable loss of a very small amount of limestone pavement (a 'priority' natural habitat type). In total the loss was 1.47 hectares of such habitat out of a total of 270 hectares that existed within the entire site. The amount that would be lost was therefore 0.54% of the total. However, the Advocate-General held that any loss of a natural habitat whose preservation was the reason for the designation constitutes an "adverse effect on integrity". No de minimis level was to be recognised in such cases.

6.7 This judgement has had far-reaching implications in the UK in terms of the approach applied by the SNCB. Many more projects are pushed into Stage 3 assessment than was previously the case. Such projects must satisfy the tests of: (i) no alternative (ii) imperative reasons of over-riding public interest; and (iii) provide compensation. This is the case even for broadscale habitats which are not irreplaceable, such as subtidal sand, over which cables need to be laid for projects offshore.

CG Fry Limited

6.8 The Court of Appeal held in the *CG Fry case* that even an 'implementing decision' in respect of a consent can be subject to the need to carry out a Habitats assessment. This means that developers who have already got planning permission, a marine licence or a development consent order ('DCO') may have to carry out a Habitats assessment when they seek approval for the discharge of conditions attached to that consent. This leaves developers with huge uncertainty. They could be mid-way through construction or operation of a project only to be told when they seek approval for discharge of some relatively minor condition that Habitats assessment has to be undertaken. This could in principle stop the project in its tracks. If baseline environmental conditions have changed for the worse in the years since consent

was granted, the SNCBs could advise the decision-maker against approval of the condition. Alternatively, the SNCBs could advise the decision-maker to approve the condition only if substantial compensation is provided, which could in theory be impossible to deliver.

6.9 The offshore wind industry is suffering from a version of this currently, with the SNCBs asking for Habitats assessments even for minor marine licences required to carry out cable repairs during the operational life of a windfarm.

7. WHY OTHER PROPOSALS ARE BETTER DEALT WITH BY GUIDANCE

7.1 There are three issues with the way in which the Habitats regime is currently operated by the SNCBs which are likely to be better dealt with by statutory guidance than legislation – but with a legislative duty on the SNCBs to "*act in accordance*" with such guidance, rather than merely to "*take it into account*". The reason these issues are best dealt with by guidance are twofold: (i) we are not seeking to over-ride any relevant case law, but rather some of the unhelpful customs and practices of the SNCBs that have built up; and/or (ii) they are matters requiring judgements to be made by the SNCBs on a case by case basis, and guiding such judgements to be made within sensible parameters is generally too nuanced for legislative drafting.

De minimis

7.2 Guidance should be put in place, defining the concept of 'de minimis' effects, and directing all SNCBs and other decision-makers on Habitats cases to recognise that where the effects of a project are de minimis, the proposals should be screened out at Stage 1 as having no "likely significant effect." Similarly, the guidance should apply to projects undergoing full assessment at Stage 2. It should state that where projects can be shown to have only de minimis effects, a conclusion of no "adverse effect on integrity" should be drawn. Specific thresholds could be set out, or suggested for different types of impact. The guidance could describe the categories of effect which should be considered de minimis. These should include: (i) negligible but permanent loss of a 'feature' of the habitat; (ii) temporary loss of a feature; and (iii) an impact on the ability of a feature to naturally regenerate.

7.3 Guidance should make clear that if the impact of the proposed project is itself de minimis and its contribution to the total 'in-combination impacts' with other projects is also de minimis, it should not be said to have a 'likely significant effect' (at Stage 1) or 'adverse effect on integrity' (at Stage 2). This used to be the approach taken by decision-makers, but in more recent years, for some habitats and species, Natural England has refused to recognise any threshold percentage below which they are content to conclude no adverse effect on integrity. Every bat, bird, fish or square metre of sand counts. The turning point was seen in two offshore wind decisions – Vanguard and Hornsea Project 3. This has pushed many more projects of all types into Stage 3 assessment (having to prove no alternative and IROPI; and having to offer compensation, even where their impacts are de minimis). The SNCB's narrow interpretation of what can constitute compensation (see below) has made this a particular challenge for developers.

7.4 The guidance should make clear that this approach to de minimis impacts should apply even where a protected site is not in a 'favourable" conservation state. Unfortunately a large proportion of sites are not, due to fishing/climate change and other factors which have nothing to do with developers. The guidance should also make clear that where sites are in an 'unfavourable' state, there is no adverse effect on integrity as long as the developer's impact will not adversely affect the ability of, or timetable for, restoration of the site to favourable status.

Precautionary Principle

7.5 The 'precautionary principle' is deeply enshrined in international and domestic environmental law. It doesn't have a consistent legal definition, and is often used without being defined at all. Essentially, the precautionary principle requires that where an effect cannot be ruled out beyond 'reasonable scientific doubt', the decision-maker must assume that it will occur. The EU's Waddenzee case in 2002 held that the Habitats Directive must be interpreted and applied by reference to the precautionary principle. The SNCBs apply it at all three stages of assessment. Its impact therefore cuts across most of the issues discussed in this article in one way or another.

7.6 The difficulty in practice is that developers and SNCBs often differ over whether or not there is reasonable scientific doubt in a particular case. Every case will be different. There is usually no directly applicable scientific case study. In the marine environment there tends to be even fewer scientific studies, which adds an extra challenge to development at sea. Given that offshore wind is a key component of the Government's clean energy mission, this is particularly unfortunate. Different assumptions about the various parameters of an assessment can swing the conclusions significantly from one side of the line to the other. SNCBs tend to apply the worst case to each parameter, and unsurprisingly then draw conclusions of potentially hugely adverse effects. In reality, the chance of all those worst case parameters eventuating is vanishingly small, yet the SNCBs feel unable to stand back and take a view on the realistic worst case overall.

7.7 Anecdotally, I am told by developers who have projects in different jurisdictions that our SNCBs apply it much more conservatively than their counterparts elsewhere.

7.8 One person's 'reasonable scientific judgement' will not be another's. It is difficult to think of generic words which could be put in guidance to force SNCBs to be universally more 'reasonable' in their scientific judgements. My only solution is that guidance sets out and regularly updates (with input from developers and independent scientific experts) specific approaches to assessment. The guidance would direct SNCBs to accept particular modelling approaches and parameters for things like bird collison risk, for example. Government should work with developers who regularly encounter Habitats issues, such as the offshore wind industry, to identify and define the most important parameters and assumptions for assessments. Legislation can require the SNCBs to 'act in accordance' with such guidance at Stages 1, 2 and 3 of the Habitats assessment process.

Compensation

7.9 Stage 3 of the Habitats process must be carried out if an adverse effect on the integrity of a protected site cannot be ruled out. The legal tests that must be met in order for consent to be granted if a project reaches this stage are set out in regulation 64(1): (i) that there is no alternative; and (ii) that there are imperative reasons of over-riding public interest for the project to go ahead. If these tests can be satisfied, then Regulation 64 enables consent to be granted, but regulation 68 requires that the body granting consent "*must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected*." This is the network of protected sites around the UK.

7.10 Energy and infrastructure developers (certainly at the larger end of the scale) can usually demonstrate no alternative and IROPI. Compensation is usually the challenge. There are four key difficulties developers face with regard to the SNCB's approach to compensation:

7.10.1 **Like-for-like compensation:** Firstly, the SNCBs insist on 'like-for-like' compensation measures. In other words, if your power station risks killing a certain type and number of fish, you must show how that type and number of fish will be replaced at or near that site by your compensation proposals. The SNCBs do not

allow for compensation which in the wider sense addresses the 'coherence of the network' of Natura 2000 sites;

7.10.2 **Excessive pessimism in both directions:** Secondly, the SNCBs adopt a highly pessimistic approach to how successful the developer's compensation measures are likely to be, and therefore the quantum required. For offshore wind projects, for example, the SNCBs base their expectations of compensation on unrealistically high bird mortality rates coupled with unrealistically low success rates for use of artificial nesting structures by breeding birds;

7.10.3 **Multiplier where there is a timing gap:** Thirdly, the SNCBs require compensation to be in place and functioning by the time the impact occurs. Any anticipated gap between impact and compensation leads the SNCBs to demand large multipliers of compensation; and

7.10.4 **Requirement for 'additionality':** Fourthly, under the Habitat Regulations, the Government has primary responsibility for managing protected sites in a way that ensures they are maintained in a 'favourable' state. In practice, this doesn't happen. Government has no resources to undertake active management of sites (and is not willing to curtail activities like trawler fishing which have highly detrimental effects). The Government also has powers to address one of the main problems for protected sites, climate change. Nevertheless, the SNCBs apply the doctrine of 'additionality' as if the Government were actively and effectively performing its duties in relation to sites. Compensation measures that developers offer which would improve the poor condition of protected sites are being rejected on the grounds that the Government should be ensuring the condition of those sites anyway. Developers are told they need to offer something over and above this. This narrows the options for compensation significantly and artificially, when developers could actually be helping Government to meet its duties.

7.11 There is nothing in legislation or case law to require the above narrow approach. It is purely custom and practice. A more flexible and holistic approach, looking at compensation that might have wider network benefits, should be encouraged via guidance. The exact terms of this guidance will need to be carefully considered. Once one lets go of the yardstick of 'like-for-like' compensation to address local assessed impacts, one enters a world of almost too much flexibility and choice over what sort of measures to put in place. However, a high degree of flexibility over how developer's money is spent for the benefit of the relevant ecosystems is something that would be very much welcomed by many nature conservation NGOs. Too often vast sums are being expended for very little benefit to the natural world at the moment.

8. SPECIES LICENSING NEEDS A SEPARATE FIX

8.1 The law protects designated 'habitats' (those listed as Ramsar sites and Special Areas of Conservation ('SAC')). In most cases, such habitats are designated because of the mixture of species of plants and animals that together form its unique 'conservation features'. Some of these will be protected species in their own right, regardless of where they are found. In other words, their specialness is intrinsic to them because of their rarity as a species, rather than simply because they form part of a special area of habitat (a Ramsar or SAC).

8.2 I have focused above on how to amend The Conservation of Habitats and Species Regulations 2017 ('Habitats Regulations') and guidance insofar as it deals with protected habitats. However, the licensing regime for disturbing protected species also deserves consideration because this can equally be a block to development and lead to expensive

compensation schemes which are poor value for nature. HS2's £100m bat shed was in fact one such case.

The test for obtaining a species licence

8.3 All bat species and their roosts are legally protected by Wildlife and Countryside Act 1981 as well as the Habitats Regulations. For HS2 this meant that wherever there were known bat populations, evidence needed to be provided to Natural England to show that the railway would avoid harm to what is known as their 'favourable conservation status' within 'their natural range' (s55(9)(b), as well as that there was 'no satisfactory alternative' (s55(9)(a)). These tests are in addition to the gateway test of purpose, being: 'to preserve public health or public safety or other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment' (s55(2)(e). Without such a licence, HS2 would have been committing an offence under the Wildlife and Countryside Act 1981 if it disturbed or harmed any bats.

Mitigation must be found even at the cost of £100m

8.4 For more common bat species, meeting the relevant tests could include simpler mitigation measures – such as new habitat planting to help increase their foraging range, or bat boxes to provide more places for roosting. A large number of wildlife licences (for bats, great crested newts and badgers2) have been issued in relation to protected species along the HS2 route, all of which can be found [here], and most of which will not have been problematic.

8.5 The difficulty for HS2 at Sheephouse Wood was that the Bechstein bats are a small colony at the northern edge of their range. This meant that complete separation of the bats from HS2's construction works and the eventual passing trains was considered to be necessary in order to maintain their 'favourable conservation status' over the long-term.

8.6 Natural England will have applied the 'precautionary principle' when engaging with HS2 to discuss the types of what measures that were needed in order to secure the species licence. I have no idea whether their judgement was overly conservative from an ecological perspective or not. However, it would certainly be helpful if new guidance on the precautionary principle and de minimis impacts (discussed earlier) were applied to species licensing as well as the protection of habitats.

8.7 If the aim is to avoid more £100m bat sheds, however, this will not always be enough.

A legal caveat needed

8.8 There will be cases where the impact is not de minimis, and where even applying a reasonable version of the precautionary principle, ecologists consider the colony of bats in question will not remain in 'favourable conservation status' following the construction of a railway or other infrastructure, certainly not within 'their natural range'.

8.9 The species licensing regime, unlike the regime for protection of habitats, does not offer a legal option of going ahead anyway subject to provision of 'compensation'. Therefore, introducing guidance on 'compensation' isn't going to help the species licensing problem in the way it would the habitats problem. If HS2 couldn't have shown that the Bechstein bat colony would stay in favourable conservation status, they simply could not have built the line through Sheephouse Wood. They had to offer up 'mitigation', however expensive that was,

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2 Badgers are protected under their own bespoke legislation, The Protection of Badgers Act 1992, whereas great crested newts (like bats, dormice etc) are all protected by The Conservation of Habitats and Species Regulations 1992

which would preserve the bats' 'favourable conservation status', and avoid an offence under regulation 43.

8.10 If in future the Government would prefer similarly large sums to be spent on wider ecological enhancement (instead of mitigation to meet the s55(9) test) they will need to introduce some type of caveat to the test in s55(9). The caveat could allow the decision-maker to accept payment for, or delivery of, a wider ecological enhancement scheme in the area where this is considered to be better value for nature. Alternatively, it could support measures to benefit the same species but in a different area of the country (outside of their 'natural range', the term used currently in the legislation). Inevitably there will be complexities over who decides the cost, location and nature of such measures, and on what basis. These are difficult issues but ones the Government would need to grapple with[3]

9. WOULD THESE PROPOSALS AMOUNT TO A 'REGRESSION' OR BREACH OF THE TRADE AND COOPERATION AGREEMENT?

9.1 In theory , Parliament can make any Act that it wishes. However, over the years, Government has signed international agreements and conventions about how it will legislate for and apply environmental protections. The EU-UK Trade and Cooperation Agreement ('TCA') is the most relevant set of international commitments, because it has the most stringent enforcement mechanism. It requires the UK to: (i) respect the precautionary principle (ii) comply with the Rio Declaration and Convention on Biological Diversity; and (iii) ensure that the UK does not "*weaken or reduce, in a manner affecting trade or investment, its environmental levels of protection […]"* below the levels in place at the end of the Brexit transition period.

9.2 Compliance with the TCA must therefore be carefully considered when reviewing the acceptability of any proposed reforms to the Habitats regime.

9.3 The principle that the UK should not weaken environmental protections is often referred to as the principle of "non-regression." It is important to note that regression only breaches the TCA to the extent it affects trade or investment. Having spoken to a number of KCs since writing my previous articles, the view seems to be that this is likely to be a high bar in practice. Furthermore, if the EU did consider such a breach was committed by the UK in changing its Habitats laws or guidance such that developers in the UK had a competitive advantage, their only recourse would be to start a formal dispute process leading potentially to retaliatory trade restrictions. In today's tariff-fuelled trade war environment, such action seems unlikely.

9.4 From a domestic political perspective, the Government will also prefer not to have to make a declaration to Parliament that a proposed legislative reform has the effect of "*reducing the level of protection provided for by any existing environmental law"*. The Environment Act 2021 does not stop the Government from reducing environmental protections, but s20 requires them to own up publicly when doing so. If the measures on 'strategic compensation' and EDPs in the Planning and Infrastructure Bill are deemed by Angela Raynor not to constitute regression, on the basis that they will lead to an overall improvement in the environment, I see no reason why the package of measures I am proposing should constitute

[3] Some commentators point to the success of district licensing schemes for great crested newts, but such schemes are unlikely to be easily replicable for many other species. See further information here: https://www.gov.uk/government/publications/great-crested-newts-district-level-licensing-schemes-for-developers/developers-how-to-join-the-great-crested-newt-district-level-licensing-scheme

regression. However, the UK's Office for Environmental Protection has raised some doubts on the question of regression and is looking into the issue "in detail" [here].

9.5 In relation to my proposals, the case could certainly be made that the net effect of the changes in law and guidance would, overall, be beneficial to the environment. However, in the face of OEP criticism, the Government might ultimately have to accept that by one narrow reading any measures they put in place to make the Habitats regime more proportionate will be considered "regression". Is this so bad, if it leads to better use of developer's money to benefit nature, alongside making consenting of much needed infrastructure slightly less torturous? That is ultimately a political decision.

10. THE PACKAGE OF MEASURES PROPOSED

10.1 This table summarises the package of changes I propose, as discussed above.

Stage of the Habitats Process	The Problems	Proposed Fix
Stage 1: Screening in or out of full assessment, based on whether there is a "<u>likely significant effect</u>"	(1) Following *People Over Wind*, too many projects are being 'screened in' and therefore having to undergo Stage 2 assessment. That case held that mitigation measures could not be taken into account at Stage 1 when considering whether a project will have a 'likely significant effect'	(1) Legislate to include a provision in the Habitats Regulations which expressly allows mitigation to be taken into account at Stage 1, reversing the effect of *People Over Wind*.
	(2) Following *Sweetman (No 1),* even a de minimis loss of a natural habitat whose preservation was itself the reason for designation (eg limestone pavement) counts as an adverse effect on integrity, and so could not be screened out at Stage 1, and would fail Stage 2.	(2) Legislate to over-ride the effect of *Sweetman (No 1)*
	(3) In recent years, the SNCBs no longer accept that projects with de minimis effects on protected features of Habitats can be screened out at Stage 1, or held not to have an adverse effect at Stage 2. Some SNCBs have adopted 'position statements' to this effect. This is a particular issue where sites are already in an 'unfavourable' conservation state (usually not due to development but climate change/fishing etc).	(3) Put in place guidance to direct SNCBs to screen out projects with only de minimis impacts (examples to be set out of what constitutes de minimis), including where their contribution to wider 'in combination' impacts is de minimis. The guidance should also make clear that where sites are in an 'unfavourable' state, there is no adverse effect on integrity as long as the developer's impact will not adversely affect the ability of, and timetable for, restoration of the site to favourable status.
	(4) The way in which the SNCBs apply the precautionary principle is a problem at Stage 1 when assessing whether a project has a	(4) Guidance to be put in place to encourage a more scientifically 'reasonable' approach to the precautionary principle. For this to be effective, specific examples

	'likely significant effect', as it is at Stages 2 and 3.	should be included of scientific approaches to assessment which are appropriately or inappropriately precautionary (eg for bird strike rate assessments for offshore wind). Legislation to provide that SNCBs "must act in accordance with guidance."
Stage 2: Full assessment process (if not screened out at Stage 1), to assess whether the proposals risk an "<u>adverse effect on integrity"</u> of a protected site	(5) The way in which the SNCBs apply the precautionary principle is a problem at Stage 2 when assessing whether a project may have an 'adverse effect on integrity', as it is at Stages 1 and 3. (6) The *Sweetman (no 1)* case described at (2) above, means that even a de minimis loss of part of a natural habitat whose preservation was the reason for the designation automatically constitutes an 'adverse effect on integrity'. (7) For other types of impacts (beyond those falling within Sweetman No 1), the SNCBs also no longer accept that de minimis losses mean there is no adverse effect on integrity (nor that effects can be screened out at Stage 1, see (3) above).	(5) Can be addressed by guidance (see (3) above). (6) Legislate to over-ride the effect of Sweetman (No 1) (7) Put in place guidance to direct SNCBs to conclude 'no adverse effect on integrity' where projects have only de minimis impacts, including where their contribution to wider 'in combination' impacts is de minimis. Legislation to provide that SNCBs "must act in accordance with guidance."
Stage 3: If Stage 2 concluded there was a risk of an adverse effect on integrity, then the applicant must make a 'derogation case'. **As well as proving 'no alternative' and IROPI, this will require delivery of compensation measures.**	(7) The aim of compensation is to ensure the 'coherence of the network' of protected sites. However, in practice, 'like-for-like' compensation measures are required by the SNCBs to address the specific effects at the affected site. (8) The precautionary principle is applied with excessive conservatism when considering how effective compensation measures are likely to be. (9) Compensation is required by SNCBs to be in place and functioning by the time the impact occurs, and any delays or gap gives rise to expectations of large multipliers of compensation. (10) The SNCBs require a developer's compensation to be "additional" to the active	(7) There is little case law setting out rules around compensation. Legislation is therefore not required to reverse the customs and practices of the SNCBs with regard to the type of compensation required. Guidance can be put in place to encourage a more flexible approach, emphasising the test of network coherence in regulation 68 rather than the need for like-for-like compensation at the affected site. **[Stephen Tromans KC has provided an Opinion, appended to this paper, which endorses this]** Issues (8), (9) and (10) can also be addressed through guidance.

	management measures that Government itself should be carrying out to maintain protected sites in a good condition. This narrows the sort of compensation developers can offer, and ignores the environmental reality.	
Post-consent (during the construction or operational phase of a project) a developer may need to discharge conditions on the consent or seek other consents or licences to implement the project	(11) The Court of Appeal in the *CG Fry* case (currently awaiting a decision in the Supreme court) has confirmed the need for Habitats assessment for discharge of conditions. This means that the project risk faced by a developer in relation to Habitats does not end when the original consent is granted.	(11) Legislate to over-ride *CG Fry*, to obviate the need for Habitats assessment for 'implementing decisions' once the primary consent for a project has been granted (whether that primary consent application was screened out of Habitats assessment or underwent such assessment).

PART TWO:

THE LEGISLATIVE CHANGES REQUIRED AND THE ROUTES TO ACHIEVING THEM

11. IMPLEMENTING THE RECOMMENDATIONS IN PART ONE

11.1 As set out in the table in section 10 above, there are essentially four matters which would benefit from legislative provisions:

11.1.1 Removing the restrictive approach to screening (ie Stage 1) which has been applied following the *People Over Wind* case. Legislation should be put in place which allows mitigation measures to be taken into account when deciding whether a project has a likely significant effect;

11.1.2 Removing the approach applied following the *Sweetman (No 1)* case. That case held that there is an adverse effect on integrity in every case where there is any loss (however small) of natural habitat whose preservation was the purpose (conservation objective) of the designation;

11.1.3 Removing the approach applied to post-consent 'implementing decisions' following the *CG Fry* case. Legislation should obviate the need for subsequent Habitats assessment for approval of conditions etc; and

11.1.4 Insertion of a positive duty on the SNCBs to 'act in accordance with' statutory guidance.

11.2 Note that the above are the legislative changes required to implement the proposals in the table. As explained in the table, a number of other matters will need to be dealt with via guidance.

12. ROUTES TO ACHIEVING LEGISLATIVE REFORM

12.1 There are four routes open to Government to change the Habitats Regulations to address the issues identified in section 11. These are:

12.1.1 Amending the provisions in the Planning and Infrastructure Bill;

12.1.2 A new bespoke Act;

12.1.3 Regulations made under s14 Retained EU Law (Revocation and Reform) Act 2023 (known as "REULA 2023"). Note that REULA only allows such Regulations to be made prior to 23 June 2026[4]; and

12.1.4 Regulations made under the Energy Act 2023. Note that such Regulations can only make changes to the Habitats regime as it applies to the offshore wind industry. I understand DEFRA is currently working on these Regulations, together with the Scottish Ministers.

12.2 Pre-Brexit, cases determined by the European Court of Justice (CJEU) were binding on the UK courts. Under REULA 2023, this case law is considered to be 'retained EA case law' (now known as 'assimilated EU case law') which still has effect in relation to the interpretation of assimilated law (such as the Habitats Regulations) until such time as (i) the relevant UK courts decide to depart from such case law, which they have been slow to do; or (ii) the assimilated law is amended or superseded so that the case law is rendered redundant.

12.3 The advantages of putting provisions within primary legislation is that those provisions cannot be challenged by way of judicial review (they might, however, still breach international commitments). Regulations can be challenged by way of judicial review to the extent they are outside the powers of the Act they are made under. However, otherwise, there is no particular legal benefit of using one route over another.

13. PROPOSED LEGISLATIVE AMENDMENTS

13.1 The following drafting (underlined in extract below) could be added to article 63 of The Conservation of Habitats and Species Regulations 2017 to address the matters referred to in section 11 (as discussed in more detail in section 6):

Assessment of implications for European sites and European offshore marine sites

63.—(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(2A) In considering whether there is likely to be a significant effect for the purpose of paragraph (1), the competent authority must have regard to the manner in which the plan or project is proposed to be carried out, including any conditions, restrictions or other mitigation measures which the person applying for the consent, permission or other authorisation proposes to implement and which are likely to be secured.

[4] It would be possible to extend this deadline by varying the relevant deadline within REULA 2023 via the Planning and Infrastructure Bill or another piece of primary legislation

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.

(6A) De minimis effects should not be considered likely to cause a significant effect on a European site or European offshore marine site for the purpose of paragraph (1)(b) or to adversely affect the integrity of a European site or European offshore marine site for the purpose of paragraph (5), including in cases where there is a de minimis effect on a natural habitat type whose preservation was the objective justifying the designation of the site, including priority natural habitat types.

(6C) In carrying out its functions pursuant to this article, the competent authority must act in accordance with guidance[5] issued by the Secretary of State, which may include guidance specifying the information that may be reasonably required by a competent authority for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required pursuant to paragraph (2).

(7) This regulation does not apply in relation to—

(a). . . . . .

(b). . . . . .

(c)a plan or project to which any of the following apply—

(i)the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 M1 (in so far as this regulation is not disapplied by regulation 4 (plans or projects relating to offshore marine area or offshore marine installations) in relation to plans or projects to which those Regulations apply);

(ii)the Environmental Impact Assessment (Agriculture) (England) (No. 2) Regulations 2006 M2;

(iii)the Environmental Impact Assessment (Agriculture) (Wales) Regulations 2017 M3; or

(iv)[F2the Merchant Shipping (Ship-to-Ship Transfers) Regulations 2020].

(d) consents, approvals permissions or authorisations required pursuant to[6] -

(i) the conditions of a planning permission granted under the Town and Country Planning Act 1990; or

(ii) the requirements of a development consent order made under the Planning Act 2008.; or

(iii) the conditions of a marine licence granted pursuant to Marine and Coastal Access Act 2009

provided that the assessment requirements were complied with at the time of the grant of planning permission, development consent or marine licence.

(8) Where a plan or project requires an appropriate assessment both under this regulation and under the Offshore Marine Conservation Regulations, the assessment required by this regulation

5 This guidance should deal with (i) de minimis impacts (ii) the precautionary principle; and (iii) compensation, to address the issues set out in section 7 of this note.

6 List to be expanded to list all similar or equivalent regimes of relevance, including those applicable in Scotland, Wales and Northern Ireland

need not identify those effects of the plan or project that are specifically attributable to that part of it that is to be carried out in the United Kingdom, provided that an assessment made for the purpose of this regulation and the Offshore Marine Conservation Regulations assesses the effects of the plan or project as a whole.

14. LEGISLATING TO EXTENDING THE EDP REGIME TO APPLY OFFSHORE

14.1 It would also be sensible to enable offshore projects to benefit from the EDP/strategic compensation regime set out in the Planning and Infrastructure Bill. Currently that regime is drafted to be limited to the territorial sea. It would be preferable to:

14.1.1 extend its geographical scope to the marine environment within the UK's Exclusive Economic Zone, as a significant proportion of offshore wind infrastructure is proposed to be located beyond the 12nm territorial waters limit. Although Regulations are due to be made under the Energy Act 2023, specifically to bring in a strategic approach to compensation under the Habitats regime for offshore wind, the usefulness of those Regulations has yet to be seen. It would therefore be preferable to have the option for the offshore wind industry, and offshore projects of other types, to use the EDP regime being proposed under the Bill. While in section 3 above I question the general usefulness of the EDP regime for major infrastructure projects, the EDP regime may be somewhat more useful for offshore wind projects than others because in general the locations of such projects coming forward are known well in advance, and they often share common impacts; and

14.1.2 extend the power to make and deliver EDPs beyond Natural England, to include the Joint Nature Conservation Committee, to reflect their role in providing statutory advice in the offshore environment.

14.2 These changes could be achieved through simple amendments to the Bill as it goes through Parliament. Specifically, article 49(2)(b) of the Bill should refer to *"the UK's Exclusive Economic Zone"*; and article 74 might be expanded to include a new 74(5) stating: "*The Secretary of State's power to designate another person pursuant to this section shall include the power to designate the Joint Nature Conservation Council in relation to EDPs including of affecting the marine environment*."

HERBERT SMITH FREEHILLS

APPENDIX

OPINION OF STEPHEN TROMANS KC IN RELATION TO THE INTERPRETATION OF THE TERM 'COHERENCE OF THE NETWORK'

In the matter of

POTENTIAL HABITATS ASSESSMENT REFORM

"COHERENCE OF THE NETWORK" IN THE HABITATS REGULATIONS

ADVICE

Summary

I have been asked to consider the meaning and effect of regulation 68 of the Habitats Regulations in the context of possible reforms that could be made to the Habitats Regulations regime. In particular this means considering the legal requirement that compensatory measures must satisfy to be considered sufficient "*to ensure that the overall coherence of Natura 2000/the national site network is protected*" and what this means for the design, timing, scale and nature of the compensation that must be secured in order for this duty to be satisfied, particularly what connection is required between the compensation and the impact identified in the Habitats Regulations Assessment (HRA).

The question needs to be considered in the light of the Habitats Directive, Article 6(4) and also Articles 2 and 3 on the purpose of the Directive and designation of sites.

There is very little in the way of useful case-law, except for two CJEU cases which emphasise the need to quantify and assess the effect on the site in question before considering compensatory measures. However, this does not imply that a like-for-like approach necessarily has to be taken.

There is Commission Guidance on Article 6(4) which is relevant and needs to be considered but is not prescriptive and leaves considerable scope for the UK in deciding how to approach compensatory measures.

There are a few legal principles which I believe can be derived from the cases and the terms of the Directive. I set out and explain these. First, the requirement of "compensatory measures" means that an accurate assessment of the impact of the plan or project will be required to identify the nature of the compensatory measures. Secondly, consideration must be given to how the impact on the site in question affects the coherence of the national site network. Thirdly, consideration must be given to how the coherence of the network is to be ensured, in the light of how such coherence is affected by the impact on the site in question.

Coherence is a broad question leaving considerable discretion with the competent authority. It does not admit of black and white rules such as the compensation having

to be like-for-like, or having always to be fully in place before the impact occurs, or not being capable of being satisfied by payment into an earmarked fund to improve other sites. These are matters of guidance which the competent authority should of course bear in mind, but are not legal requirements.

Whether coherence is ensured is at the end of the day a value judgment having regard to these factors. It is a much broader question than simply replacing like with like in terms of lost habitat or reduced species numbers. Part of the exercise is to consider the likelihood that the measures proposed will "ensure" this, but again that is not a prescriptive approach in terms of matters such as type, amount and timing of compensatory measures.

Scope of instructions

1. I am instructed in the context of considering possible reforms that could be made to the Habitats Regulations regime. Those instructing me understand that DEFRA and the Scottish Ministers are currently preparing draft regulations under section 293 of the Energy Act 2023, which may include: (a) provision for and in connection with the assessment of the environmental effects of relevant offshore wind activities in relation to protected sites; and (b) provision about the taking or securing of measures by a public authority in compensation for any adverse environmental effects of relevant offshore wind activities in relation to protected sites ("compensatory measures").

2. Further, sub-sections 293(4) and (5) of the Energy Act 2023 permit that such regulations may include provisions disapplying or otherwise modifying, whether generally or in specified circumstance or subject to specified conditions, regulations 9 and 10 and Part 6 of the Habitats Regulations 2017. Nonetheless, the appropriate authorities must comply with any other relevant statutory duties and international obligations and agreements (including the precautionary principle).

3. In that context, those instructing me understand that DEFRA and Scottish Ministers have received legal advice that, for compensatory measures to satisfy regulation 68 of the Habitats Regulations they must be "like-for-like" with the impacts identified in the

associated HRA but are considering whether changes to the Habitats Regulations could broaden the approach.

4. I have been instructed to prepare an Opinion which can be shared with DEFRA and the Scottish Government which describes the legal requirements that compensatory measures must satisfy to be considered sufficient "*to ensure that the overall coherence of Natura 2000 is protected*."

5. I am asked to consider any European and domestic case law on the nature and standard of compensatory measures that is required to be secured for the decision-maker's duty in regulation 68 to be satisfied. My advice should try to provide clarity on the legal meaning of the duty on the decision maker "*to ensure that the overall coherence of Natura 2000 is protected*" and what this means for the design, timing, scale and nature of the compensation that must be secured in order for this duty to be satisfied, particularly what connection is required between the compensation and the impact identified in the HRA.

Regulation 68

6. Reg. 68 provides:

   68*. Where in accordance with regulation 64—*

   (a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site or a European offshore marine site, or

   (b) a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment,

   the appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.

7. The context is that reg. 68 allows a plan or project to be agreed to despite a negative assessment of the implications for the European site or the European offshore marine site if the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest.

8. As the result of the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 references to Natura 2000 in the 2017 Regulations and in guidance now refers to the new national site network. Reg 3(10) of the 2017 Regulations provides that on or after exit day, references to "Natura 2000" are to be construed as references to the national site network.

9. By reg. 3(1) the "national site network" means the network of sites in the United Kingdom's territory consisting of such sites as— (a) immediately before exit day formed part of Natura 2000; or (b) at any time on or after exit day are European sites, European marine sites and European offshore marine sites for the purposes of any of the retained transposing regulations.

10. The previous government's policy paper on these changes, published in January 2021 stated:[1]

    " *SACs and Special Protection Areas (SPAs) in the UK no longer form part of the EU's Natura 2000 ecological network. The 2019 Regulations have created a national site network on land and at sea, including both the inshore and offshore marine areas in the UK. The national site network includes:*
    - *existing SACs and SPAs*
    - *new SACs and SPAs designated under these Regulations*

    Any references to Natura 2000 in the 2017 Regulations a nd in guidance now refers to the new national site network.
    Maintaining a coherent network of protected sites with overarching conservation objectives is still required in order to:
    - *fulfil the commitment made by government to maintain environmental protections*
    - *continue to meet our international legal obligations, such as the Bern Convention, the Oslo and Paris Conventions (OSPAR), Bonn and Ramsar Conventions*".

11. It also explains the approach to network objectives, which are the management objectives for the national site network:

    "The 2019 Regulations establish management objectives for the national site network. These are called the network objectives.
    The UK Government and devolved administrations (in Wales, Northern Ireland and Scotland) will cooperate to manage, and where necessary, adapt the network to contribute towards meeting the network objectives.

[1] *Changes to the Habitats Regulations 2017*, https://www.gov.uk/government/publications/changes-to-the-habitats-regulations-2017/changes-to-the-habitats-regulations-2017

Any references in the 2017 Regulations to meeting the 'requirements of the Directives' includes achieving the network objectives.
The appropriate authorities may publish guidance relating to these requirements. The appropriate authorities are the Secretary of State for Environment, Food and Rural Affairs in England and the Welsh Ministers in Wales.
The network objectives are to:

- *maintain or, where appropriate, restore habitats and species listed in Annexes I and II of the Habitats Directive to a favourable conservation status (FCS)*
- *contribute to ensuring, in their area of distribution, the survival and reproduction of wild birds and securing compliance with the overarching aims of the Wild Birds Directive*

The appropriate authorities must also have regard to the:

- *importance of protected sites*
- *coherence of the national site network*
- *threats of degradation or destruction (including deterioration and disturbance of protected features) on SPAs and SACs*

The network objectives contribute to the conservation of UK habitats and species that are also of pan-European importance, and to the achievement of their FCS within the UK."

Construing regulation 68

12. As those instructing me will be aware, reg. 68 as part of the 2017 Regulations is "assimilated law" in terms of the Retained EU Law (Revocation and Reform) act 2023. By section 6 of the European Union (Withdrawal) act 2018 (as amended) so far as it remains unmodified, it is to be interpreted in accordance with any assimilated case law, whether EU or domestic. However, as explained below, case law on the subject is extremely limited.

13. Also, on normal principles of statutory construction, since the 2017 Regulations and their predecessors were intended to transpose EU law in the form of the Habitats and Birds Directives, a purposive approach, having regard to the requirements and underlying purpose of those Directives will be required. It is necessary therefore to consider the Habitats Directive 92/4/EC.

The Habitats Directive

14. The equivalent provision to reg. 68 is Article 6(4), which reads:

" If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

15. As can be seen the wording, apart from the later change to refer to the national site network rather than Natura 2000, is the same.

16. Article 6(4) has to be read in the context of the Directive as a whole, which contains other relevant provisions on Natura 2000. These are as follows.

17. By Article 2(1), the aim of the Directive is "*to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies*." Further by Article 2(2) measures taken pursuant to it (which would include taking compensatory measures) must "*be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest*". Further, by Article 2(3) such measures must "*take account of economic, social and cultural requirements and regional and local characteristics*."

18. Article 3(1) deals with the establishment of Natura 2000:

"*A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range*."

19. By Article 3(2) each Member State must contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in Article 3(1). To that effect each Member State must designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in Article 3(1).

20. By Article 3(3), where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10, which requires Member States to endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora. Such features are those which, by virtue of their linear and continuous structure or their function as stepping stones, are essential for the migration, dispersal and genetic exchange of wild species.

Case law and Guidance on Article 6(4)

21. As compared with Article 6(3) of the Directive, there is a dearth of case law on the derogating Article 6(4) on how to approach IROPI and compensation: see Margherita Pieraccini, *The Public Interest in Environmental Decision-Making: A Pragmatist Turn*.[2]

22. It can be said that Article 6(4) must be interpreted strictly, being an exception to Article 6(3) and that " … *the assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighting up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified*.".[3]

23. It can also be said that knowledge of the implications of a project or plan in the light of site conservation objectives is a necessary prerequisite for applying Article 6(4) and that the ecological damage to the site must be precisely identified through the appropriate assessment and the public interest in conservation protected through a strict application of the precautionary principle:[4]

[2] *Journal of Environmental Law*, Volume 36, Issue 3, November 2024, Pages 363-383, https://doi.org/10.1093/jel/eqae026
[3] Case C-304/05 *Commission of the European Communities v Italian Republic* [2007] ECR I-07495, paras 82–83.
[4] Case C-182/10 *Marie-Noëlle Solvay and Others v Région Wallonne* [2012] ECR I-00000, paras 74.

"*Moreover, [Article 6(4)] can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of the Habitats Directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for the application of Article 6(4), since, in the absence of those elements, no condition for the application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified*."

24. The Commission Guidance on *Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC* (2019/C 33/01)[5] contains section 5.4 on adopting compensatory measures stating that they are "… *intended to offset the residual negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 network is maintained*." It also states:

"*The compensatory measures constitute measures specific to a project or plan, additional to the normal duties stemming from the Birds and Habitats Directives. These measures aim to offset precisely the negative impact of a plan or project on the species or habitats concerned. They constitute the 'last resort' and are used only when the other safeguards provided for by the directive are exhausted and the decision has been taken to consider, nevertheless, a project/plan having a negative impact on the integrity of a Natura 2000 site or when such an impact cannot be excluded*."

25. At para. 5.4.2 the Guidance refers to Articles 3 and 10 of the Directive, which is have set out above, and says that the word 'ecological' is used both in Article 3 and Article 10 to explain the nature of the coherence and that it "… is obvious that the expression 'overall coherence' in Article 6(4) is used in the same meaning." It goes on:

"*Having said this, it is clear that the importance of a site to the coherence of the network depends on the site's conservation objectives, on the number and status of the habitats and species for which it has been designated, and on its role in securing an adequate geographical distribution in relation to the range of the habitats and species concerned*."

26. The requirement for compensation will therefore depend, as the example given in the guidance states, on the rarity of the damaged habitat type and its range, and how difficult or straightforward it is to recreate.

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC0125(07)

27. It then states:

"*With regard to a plan or project, the compensatory measures defined to protect the overall coherence of Natura 2000 network will have to address the criteria mentioned above. This would mean that compensation should refer to the site's conservation objectives and to the habitats and species negatively affected in comparable proportions in terms of number and status. At the same time the role played by the site concerned in relation to the bio-geographical distribution has to be replaced adequately*."

28. Also it is relevant to look at the selection criteria when the site was originally designated, when designing the compensatory measures for a project, to ensure that the measures "*… provide properties and functions comparable to those which had justified the selection of the original site*".

29. A similar approach is required for SPAs under the Birds Directive: by analogy, it could be considered that the overall coherence of the network is ensured if: compensation fulfils the same purposes that motivated the site's classification; compensation fulfils the same function along the same migration path; and the compensation areas are accessible with certainty by the birds usually occurring on the site affected by the project.

30. The overall position on coherence is summarised as follows:

"*In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; and b) provide functions comparable to those which had justified the selection criteria for the original site, particularly regarding the adequate geographical distribution. Thus, it would not be enough for the compensatory measures to concern the same biogeographical region in the same Member State. The distance between the original site and the place of the compensatory measures is not necessarily an obstacle as long as it does not affect the functionality of the site, its role in the geographical distribution and the reasons for its initial selection*."

31. Para. 5.4.3 states some general principles on compensation, with examples. This is written in non-prescriptive terms. On the timing of compensation, it says:

"*… as a general principle, a site should not be irreversibly affected by a project before the compensation is in place. However, there may be situations where it will not be possible to meet this condition. For example, the recreation of a forest habitat would take many years*

to ensure the same functions as the original habitat negatively affected by a project. Therefore, best efforts should be made to ensure that compensation is in place beforehand and, in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime."

32. Para. 5.4.4 states the key elements to consider in the compensation measures, which should address all issues needed to offset the negative effects of a plan or project and to maintain the overall coherence of the network. A list is provided of elements to consider.

33. Para. 5.5.1 deals with targeted compensation, stating that the compensation should consist of ecological measures to address the specific issues of integrity identified and should not consist simply of payments towards special funds:

"*Once the integrity of the site likely to be damaged and the actual extent of the damage have been identified, the compensatory measures must address these issues specifically, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are compensated for in the long term. Thus, these measures should be the most appropriate to the type of impact predicted and should be focused on objectives and targets clearly addressing the Natura 2000 elements affected. They must clearly refer to the structural and functional aspects of the site integrity, and the related types of habitats and species populations that are affected. This entails that the compensatory measures must necessarily consist of ecological measures. Therefore, payments to individuals or towards special funds, regardless of whether or not these are ultimately allocated to nature conservation projects are not suitable under the Habitats Directive. In addition, any secondary or indirect measure that might be proposed to enhance the performance of the core compensatory measures must have a clear relationship to the objectives and targets of the compensatory measures themselves*."

34. Para. 5.5.2 requires that the effectiveness of the compensation be addressed, meaning both technical feasibility and the appropriate extent, timing and location of the compensatory measures:

"*Compensatory measures must be feasible and operational in reinstating the ecological conditions needed to ensure the overall coherence of the Natura 2000 network. The estimated timescale and any maintenance action required to enhance performance should be known and/or foreseen right from the start before the measures are rolled out. This must be based on the best scientific knowledge available, together with specific investigations for the precise location where the compensatory measures will be implemented. Measures for which there is no reasonable guarantee of success should not be considered under Article 6(4), and the likely success of the compensation scheme should influence the final approval of the plan or project in line with the prevention principle. In addition, when it comes to deciding between different possibilities for compensation, the most effective options, with the greatest chances of success, must be chosen*."

35. More detailed guidance is provided on technical feasibility (para. 5.5.3), extent of compensation (5.5.4), location of compensatory measures (5.5.5) and timing of compensation (5.5.6). On timing, it is stated:

"*Timing the compensatory measures calls for a case-by-case approach. The schedule adopted must provide continuity in the ecological processes essential for maintaining the structure and functions that contribute to the overall coherence of the Natura 2000 network. This requires a tight coordination between the implementation of the plan or project and the implementation of the compensatory measures, and relies on issues such as the time required for habitats to develop and/or for species populations to recover or establish in a given area.*"

Status of Commission Guidance

36. Given that the Guidance provides the only detailed discussion of these issues, absent any relevant case law, it is important to be clear on its status.

37. The Foreword to the Guidance emphasises that its intention is to provide guidelines and that only the Court of Justice of the European Union is competent to authoritatively interpret Union law. It incorporates and summarises CJEU caselaw where relevant, but there is no case law cited in respect of Article 6(4) and compensatory measures. It also states:

"*The interpretations provided by the Commission cannot go beyond the Directive. This is particularly true for this directive as it enshrines the subsidiarity principle and as such lets a large margin of manoeuvre to the Member States for the practical implementation of specific measures related to the various sites of the Natura 2000 network. In any case, the Member States are free to choose the appropriate way they wish to implement the practical measures provided the latter achieve the results of the Directive.*
However interpretative, this document is not intended to give absolute answers to site specific questions. Such matters should be dealt with on a case-by-case basis, while bearing in mind the orientations provided in this document."

38. The courts will inevitably look at the guidance and give it due regard, as for example the Supreme Court did in *R (Morge) v Hampshire County Council* [2011] 1 WLR 268 considering the Commission guidance on article 12 of the Habitats Directive as background to deciding its meaning – see paras. 14, 20, 21, 22 of Lord Brown's judgment**.** However, ultimately what counts are the words of the Directive and the Regulations.

Discussion

39. In my view from this, it emerges that there are three legal principles (as opposed to guidance) which should be applied.

40. The first is that the requirement of "compensatory measures" means that an accurate assessment of the impact of the plan or project will be required to identify the nature of the compensatory measures (*Italy* and *Solvay* cases).[6] This makes sense as without knowing what the impact is, there is no sound starting point for designing or assessing compensatory measures. However, I would emphasise that it does not follow from this that the measures must be like-for-like in nature.

41. Secondly, consideration must be given to how the impact on the site in question affects the coherence of the national site network. This appears from the guidance but rests primarily on the words of Article 6(4) and the provisions of Article 3 on the creation of the network. It will involve considering the reasons why the site was designated and its relative importance within the network. A summary of selection principles used in the UK is provided in JNCC Report No. 270, *The Habitats Directive: Selection of Special Areas of Conservation*,[7] Table 1.1 and would seem to be relevant for this purpose. These include: representativity of the habitat; area of habitat; conservation of structure and function; proportion of UK population; conservation features important for species survival; isolation of species populations; priority/non-priority status; rarity; geographical range; multiple interest.

42. Thirdly, consideration must be given to how the coherence of the network is to be ensured, in the light of how such coherence is affected by the impact on the site in question. This seems to me a very broad question leaving considerable discretion with the competent authority. It does not seem to me to admit of black and white rules such as the compensation having to be like-for-like, or having always to be fully in place before the

[6] See footnotes 3 and 4 above.
[7] https://data.jncc.gov.uk/data/5d20b480-9cc1-490f-9599-da6003928434/JNCC-Report-270-scan-web.pdf

impact occurs, or not being capable of being satisfied by payment into an earmarked fund to improve other sites. These are matters of guidance which the competent authority should of course bear in mind, but are not legal requirements. It will be necessary to have regard to the national site network objectives explained at para. 11 above. It will also be necessary, in line with Articles 2(1) and 3, to consider the implications for maintaining or restoring, at favourable conservation status, natural habitats and species of interest. This does not however imply a like for like approach.

43. Whether coherence is ensured is at the end of the day a value judgment having regard to these factors, and comes down in my view to whether the compensatory measures will address the effects of the plan or project so as to enable the national network to continue functioning so as to provide an adequate representative national network of sites, providing the ecological processes essential for maintaining the structure and functions that contribute to the overall coherence of the network. That is a much broader question than simply replacing like with like in terms of lost habitat or reduced species numbers. Obviously part of that exercise is to consider the likelihood that the measures proposed will ”ensure” this, but again that is not a prescriptive approach in terms of matters such as type, amount and timing of compensatory measures.

44. I hope that this has provided sufficiently clear answers to the questions presented, but am of course happy to discuss this further should those instructing me with to get in touch.

STEPHEN TROMANS KC
39 Essex Chambers
London WC2A 1DD

23 April 2025

ANNEX B:

Scottish Renewables and RenewableUK joint response to Electricity Infrastructure Consenting in Scotland Consultation

Scottish Electricity Consenting Team
Department for Energy Security and Net Zero
7th Floor
3-8 Whitehall Place
London SW1A 2AW

Delivered via email: EMAIL

6th December 2024

Dear Ms Richardson,

Response to: Electricity Infrastructure Consenting in Scotland Consultation

On behalf of Scottish Renewables and RenewableUK's members, we welcome the opportunity to respond to the consultation on **Electricity Infrastructure Consenting in Scotland:** ***Proposals for reforming the consenting processes in Scotland under the Electricity Act 1989.***

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 360 organisations that deliver investment, jobs, social benefit, and reduce the carbon emissions which cause climate change.

RenewableUK's (RUK) members are building our future energy system, powered by clean electricity. We bring them together to deliver that future faster, a future that is better for industry, billpayers, and the environment. We support over 400 member companies to ensure increasing amounts of renewable electricity are deployed across the UK and to access export markets all over the world. Our members are business leaders, technology innovators, and expert thinkers from across the industry.

Scottish Renewables and RenewableUK welcome the opportunity to respond to the proposals put forward in this joint UK Government and Scottish Government consultation on Electricity Infrastructure Consenting in Scotland. To achieve clean power by 2030, planning issues in Scotland need to be urgently addressed.

The sector is fully supportive of efforts to speed up consenting timelines from project development to consent.

The proposals put forward in this consultation may help to drive greater consistency in the quality of stakeholder engagement and help to frontload the identification and resolution of

issues where possible. However, it should be recognised that, whilst pre-application consultation (PAC) is not presently mandatory for applications made under the Electricity Act 1989, it is already standard practice across onshore and offshore energy projects with existing Scottish Government guidance and circulars under the Town and Country Planning regime readily applied to electricity infrastructure proposals. As such, the proposal to mandate pre-application community consultation and associated reporting is unlikely to represent any meaningful change from current practice.

In addition to responding to the individual questions in this consultation, we have a few general observations on this consultation and on electricity infrastructure consenting in Scotland that are not addressed in this consultation but could positively impact consenting timelines and processes.

- **Overall timelines**: We are concerned that the proposals do not set clear timelines for each stage of the pre-application process – including consultation periods and when consultees will return feedback. Without clear timelines, we are concerned that the proposals won't reduce the time it takes for developments to be consented.

- **Meaningful feedback and engagement**: We are also concerned that developers already participating in pre-application processes are not receiving meaningful engagement and consistent feedback. In some instances, we know that consultees do not respond until an application has been filed or decline to engage before EIA scoping. For the proposals put forward in this consultation to have an impact, it will be vital that feedback from statutory consultees, local authorities, the Marine Directorate and the Energy Consents Unit (ECU) are timely and meaningful. Continued extension of timelines and lack of substantive feedback – that could then be addressed at an early stage of a project – significantly impacts project timelines.

- **An overly bureaucratic process**: We are concerned that this proposal would result in an administratively burdensome exercise that creates additional barriers to renewable energy proposals. Much of this pre-application proposal is currently standard practice for onshore and offshore wind and is unlikely to represent any meaningful change from current practice. The development process for wind projects is well established. This proposal also frontloads work currently done later in the development process and adds checkpoints that will slow down the application process.

- **Resources:** Appropriate resourcing for all relevant government departments, local authorities, and statutory consultees, which includes upskilling of staff and ensuring retention of personnel, will be critical to meet the demand in casework to deliver electricity infrastructure at pace and to prevent unnecessary consenting delays. However, this consultation does not address how both governments plan to overcome this challenge and meet the demand for technically skilled staff needed to

ensure that applications are processed in a timely manner. We are concerned that by formalising the pre-application process, more pressure will be put on already stretched resources, including the ability to provide meaningful feedback to developers. We would request more information on how the proposal will guarantee adequate, ring-fenced funding resources for statutory consultees.

This will be particularly pertinent due to the increased diversity of generation and grid stability projects entering the Scottish consenting system. These now span long-duration pumped storage hydro, short-duration grid forming batteries and grid stability synchronous compensators to green hydrogen, in addition to Scotland's existing wind, solar and grid infrastructure projects.

- **Habitats Regulations Assessments (HRA) reform:** The operation of the HRA regime has been the most significant single source of delays and complexity in offshore wind consenting. Urgent change is required in how the Government, statutory advisors, and regulators approach HRA issues – with an urgent need to expedite the implementation of the Marine Recovery Fund and move towards packages of measures focussed on ecosystem functionality rather than 'like for like'. Goals of Habitats Regulations and wider protected sites legislation should also align with and explicitly support UK nature recovery targets. This will unlock substantial industry contributions to biodiversity targets and increase the UK's natural capital. However, there is a lack of recognition in this consultation that this challenge provides a significant barrier to consents across the UK.

As the volume of projects expands significantly in the period up to and immediately beyond Clean Power 2030, it will be critical that the challenges outlined above are also addressed urgently.

Sincerely,

Megan Amundson
Head of Onshore Wind and Consenting
Scottish Renewables

Friederike Andres
Policy Manager
RenewableUK

Consultation Questions

PROPOSAL 1: PRE-APPLICATION REQUIREMENTS

Pre-applications requirements

1. Do you agree with the proposal for pre-application requirements for onshore applications? Why do you agree/not agree? How might it impact you and/or your organisation?

Firstly, we take issue with the premise of this proposal, which is based on data around incomplete proposals from 2007. In the Scottish Onshore Wind Sector Deal, the onshore wind industry has already agreed to submit complete and robust applications to accelerate application processing. A recent review of the Energy Consents Unit's (ECU) online portal showed that 86% of applications already complete a pre-application process with local planning authorities and associated reporting without a statutory requirement to do so.

Secondly, we are concerned that front-loading more work into a pre-application process and creating a formalised pre-application requirement to manage applications without addressing broader consenting challenges will not reduce consenting timelines and could increase developers' costs.

As highlighted in the introductory comments, a lack of meaningful feedback and engagement, attributed to the lack of resources, significantly contributes to delays in the consenting process. Appropriate resourcing for all relevant government departments, local authorities and statutory consultees, which includes upskilling staff and ensuring personnel retention, will be critical to meet the high demand in casework to deliver electricity infrastructure at pace and prevent unnecessary consenting delays.

For example, the Planning (Scotland) Act 2019 provides sufficient support for creating a more robust pre-application phase to ensure that applications are complete when submitted. Developers use the pre-application services that local planning authorities (LPA) offer; however, support and engagement are often limited because LPAs are not sufficiently resourced to provide adequate support as part of the pre-application process.

Cost factors already make developing renewable energy projects more costly in Scotland than in England or Wales. These include TNUoS charges, abnormal load costs and delays, oversail and overrun leases, and aviation mitigations. Therefore, it is important not to create a pre-application process that creates additional administrative costs and burdens.

This proposal begins to mimic the Development Consent Order (DCO) process in England, which industry has found to be document heavy, costly, and slow. Members share that the legal costs for DCO proposals exceed £800,000, and one recent proposal cost £1.1m. We

must avoid replicating this system in the Scottish planning system. It does not achieve the goal of shortening timelines and increases project costs.

The Scottish Onshore Wind Sector Deal paved the way for decreasing planning timelines and barriers to deployment, including ensuring costs do not make projects financially inviable. Creating a pre-application system that increases costs through administrative burden would be counterproductive to the ambitions of Scottish Ministers.

Thirdly, we are concerned about the preliminary report that is proposed in this consultation:

The formalised Preliminary Information Report is an additional administrative burden that duplicates developers' efforts to describe potential projects to local communities. Industry is very concerned that the preliminary report requires information that may not be available at this stage of a project's development. There is a risk that the preliminary report duplicates work that will be completed later in development, adding additional costs.

The consultation paper does not set clear expectations for Preliminary Reports or associated consultee responses to ensure that this new stage remains proportionate, efficient and adds value. The single reference to the provision of "brief details of any environmental considerations" is vague, misaligned with applicable tests under Environmental Impact Assessment (EIA) regulations and could lead to a wide spectrum of information being submitted, including full draft EIA reports, which would require significant resources and time to prepare and review.

Our members estimate that the time it takes to create the preliminary report, the time required for LPAs to review it, get feedback, and update the report so that it won't receive an objection once submitted, will add at least four to six months to the development process.

The ability of the relevant planning authority to comment on the quality of the Statement of Community Consultation and the Preliminary Information Report also provides an additional and unnecessary stage at which a project could be blocked. This will be particularly true if LPAs are not provided with additional resources to undertake this extra review. We are concerned that the additional burden of this proposal on LPAs will significantly slow down response times to this new proposed process.

Should the proposal for a preliminary report requirement be taken forward, guidance must be provided that clearly articulates that reports should focus on the key issues arising from the development.

A more collaborative and efficient approach is possible, for example, through the less prescriptive 'gate check' functions of the Energy Consents Unit (ECU), which ensure that any issues or omissions are addressed early on without introducing the delays associated with a formal rejection and resubmission process.

The process laid out in this proposal adds additional requirements to what makes an application ‘complete’ by frontloading work that currently happens later in the development process. By requiring information to be provided at an inappropriately early stage in the project development process, there will be less opportunity for consultation between developers and statutory consultees. Aspects of projects will need to be fixed in pre-application, leaving less opportunity for flexibility and changes to accommodate feedback received in pre-application. This will be especially true where statutory consultees lack the resources to engage fully in the pre-application process. This may create a process where communities get less say in how projects are developed and delivered than they do today. It is not our members’ experience that the pre-application process currently used in England prevents the need to respond to concerns or objections later in the process.

Transmission projects already undergo an extensive pre-application process. Given their complexity and the options laid before consultees, it makes sense to have a more robust community engagement process. A process of this scale is not proportionate to the scale of onshore renewable projects. What works for the transmission process should not be applied to smaller renewable projects.

2. Do you agree with the proposal for pre-application requirements for offshore generating stations? Why do you agree/not agree? How might it impact you and/or your organisation?

Our views on offshore are similar to our views on onshore expressed in our answer to question 1.

Industry recognises the benefits of robust pre-application engagement. However, it is already standard practice for Section 36 consenting, as it is for proposals that go through Town and Country Planning.

We are concerned that front-loading more work into a pre-application process and creating a formalised pre-application requirement to manage applications without addressing broader consenting challenges will not reduce consenting timelines and could increase developers' costs.

As highlighted in the introductory comments, a lack of meaningful feedback and engagement, attributed to the lack of resources, significantly contributes to delays in the consenting process. Appropriate resourcing for all relevant government departments, local authorities and statutory consultees, which includes upskilling staff and ensuring personnel retention, will be critical to meet the high demand in casework to deliver electricity infrastructure at pace and prevent unnecessary consenting delays.

The formalised Preliminary Information Report is an additional administrative burden that duplicates developers’ efforts to describe potential projects to local communities. Industry is

very concerned that the preliminary report requires information that may not be available at this stage of a project's development. There is a risk that the preliminary report duplicates work that will be completed later in development, adding additional costs.

The consultation paper does not set clear expectations for Preliminary Reports or associated consultee responses to ensure that this new stage remains proportionate, efficient and adds value. The single reference to the provision of "brief details of any environmental considerations" is vague, misaligned with applicable tests under Environmental Impact Assessment (EIA) regulations and could lead to a wide spectrum of information being submitted, including full draft EIA reports, which would require significant resources and time to prepare and review.

3. Do you agree that pre-application requirements should apply to all onshore applications for electricity generating stations, and for network projects that require an EIA? Why do you agree/not agree? How might it impact you and/or your organisation?

Evaluating EIA reports places the greatest demand on consenting authorities' capacity. Currently, there is no standard scope for EIAs, so they have become increasingly complex, encompassing issues of varying relevance and impact.

If the Government is committed to introducing pre-application requirements, a formal consultation on a standard EIA scope is required. For example, we recommend excluding life extension applications and Varied Consent applications under Section 36C from the full requirements. Previously consented projects varying that consent or approaching the end of their consent and which need to apply for an extension to that operational period should not be subject to these onerous pre-application requirements.

This approach would align with existing practice under the Town and Country Planning regime and avoid proposals for minor variations after the principle of development has already been confirmed from being subject to resource-intensive and disproportionate requirements.

If this were to be applied to projects that do not require an EIA, developers would need to be provided with a list of assessments to ensure transparency about what is required where the scoping process does not apply.

4. Do you agree that a multistage consultation process may be appropriate for some network projects? Why do you agree/not agree? How might it impact you and/or your organisation?

Industry is concerned about the additional consultation requirements resulting from the proposals set out in this consultation – which could risk increasing timelines.

5. Do you agree with the proposal for an ‘Acceptance Stage’ for applications? How long do you think an acceptance stage should be (in weeks)? Why do you agree/not agree? How might it impact you and/or your organisation?

Industry does not agree with introducing an Acceptance Stage without more information on how it would work.

It would be essential to clarify what information is required for the decision maker to determine an application, for example, how closely it would follow current Section 55 of the Planning Act (2008).

We furthermore strongly object to enabling planning authorities to raise objections during the Acceptance Stage based on perceived inadequacies in pre-application consultation. Planning authorities should not be allowed to object to whether the proposal meets pre-application requirements.

The ECU should make all determinations on whether an application is complete, and verification and acceptance should be based solely on procedural requirements rather than predetermining stakeholder views on projects' planning merit.

In addition, we recommend that the word ‘rejection’ be avoided in this context. It implies that the project was refused rather than submitted incompletely.

Overall, the consultation document lacks clarity regarding the benchmarks or a legislative framework as within the Planning Act 2008 that case officers will use to assess the adequacy of pre-application consultations. Without clear benchmarks, there is a risk of inconsistent decision-making and the potential for delays as applicants seek to address subjective interpretations of the requirements.

Before providing any qualitative response to this question, we request that the Scottish Government provide detailed guidance on the criteria that planning authorities will use to assess these consultations, including the specific benchmarks that will determine acceptability.

With regard to a timeline, we propose 28 days for onshore and offshore developments – which aligns with England and Wales.

Without clarity on timescales and clear guidance, the Acceptance Stage may create another administrative burden for LPAs, risking delays to proposals or opportunities to object to submissions. Further uncertainty impacts projects overall, including investor confidence.

The requirement within Section 55 of the Planning Act 2008 is for the local authority to provide a response to Planning Inspectorate (PINS) on behalf of the Secretary of State

confirming in their opinion if the applicant carried out their pre-application duties under sections 42, 47 & 48 in terms of their duty to consult and publicise. This is a less onerous requirement than is suggested in this consultation for an objection procedure.

6. Do you agree that the Scottish Government should be able to charge fees for pre application functions? Why do you agree/not agree? How might it impact you and/or your organisation?

We recognise that the provision of meaningful pre-application engagement and advice requires to be supported by adequate resourcing, which inevitably incurs costs. Equally, statutory planning functions and duties must be adequately funded by relevant public bodies without relying upon additional contributions from applicants to 'top up' budgets. Any revenue generated from such charges should be used to improve service delivery rather than fill existing capacity gaps. Should the Scottish Government set a requirement for applicants to use a chargeable pre-application function, this would need to demonstrably deliver added value beyond baseline practice.

However, as outlined in SR's response to the Resourcing the Planning System consultation in May of 2024, planning fees have risen substantially over the last decade, but there has not been a corresponding improvement in service.

For example, an Application for Consent under s36 of the Electricity Act 1989 (with a request for deemed planning permission) for a generating station with a rated capacity of 100-200MW:

Fee in *Electricity (Applications for Consent) Regulations 1990*	**£5,000**	
Fee in *Electricity (Applications for Consent) Amendment (Scotland) Regulations 2005*	**£20,000**	A real terms increase of £13,008.20 in 2005, if you take the inflation factor at 2.3% from 1990 to 2005, or 186% increase.
Fee in *The Electricity (Applications for Consent and Variation of Consent) (Fees) (Scotland) Regulations 2019: (noting thresholds changed)*	50–100 MW = **£125,000** 100–300MW = **£180,000**	A real terms increase of £97,393 (353% increase) in 2019 for a 99MW wind farm, taking inflation to be 2.3% between 2005–2019. A real terms increase of £152,393 (552% increase) for a 105MW wind farm, taking

		inflation to be 2.3% between 2005–2019.

For a 49MW wind farm under the Town and Country Planning regulations the costs would be:

2004 regs	capped at **£13,000**	a fee of £260 per 0.1 ha
2022 regs	capped at **£150,000**	a fee of £500 per 0.1 ha

Offshore wind projects already pay £264k plus £15k per 5 MW over 1 GW.[1]

Evidence of the decline in service for onshore projects can be seen in the reduction in pre-application engagement, the long delay in responses to communications and planning authorities regularly asking for extensions to the 16-week period in which they are expected to respond as statutory consultees. On this final point, there are cases where planning authorities have asked for extensions of up to 2 years.

The fees outlined in this proposal are to be used to facilitate the process between developers and stakeholders. As developers already do the work outlined in the pre-application proposal and facilitate those meetings independently, we don't recognise the value of this proposal. The service required from the Marine Directorate and ECU is to make decisions on applications, not facilitate the application process. Should fees be charged, they should be used to adequately resource statutory consultees – including consultees with the necessary technical expertise – to provide meaningful and timely feedback and decision-making. And they should be ringfenced for that specific purpose.

Currently, ECU is increasing its capacity to address the increasing number of applications, which means more application fees are coming in. The current fee system should be sufficient to pay for the required work. If there were a business case for increasing fees for ECU and the Marine Directorate decision-making, developers would require that the need be demonstrated, with a solid understanding of the resource required for applications and how the current fee system falls short.

7. Do you agree that our proposals for pre-application requirements will increase the speed of the end-to-end project planning process overall? Why do you agree/not agree?

Overall, industry supports frontloading stakeholder engagement and issue resolution into the pre-application stage. However, we are concerned that the proposals in this consultation would not shorten the overall timeframes for applications but instead introduce more complex and administrative heavy processes.

[1] Marine licensing and consenting: application fees - gov.scot

We are concerned that the proposal shifts work to earlier in the process by adding additional pre-application administrative burden and cost. This will increase the pre-application processes and introduce fees without guaranteed input from statutory consultees, resulting in higher costs for developers overall and additional administrative costs for Section 36 proposals.

Without sufficient resources for statutory consultees to comply with their new obligations, this proposal risks lengthening the planning process and reducing developers' ability to respond to pre-consultation feedback.

We are concerned that, as outlined in our introduction, these proposals do not address the specific issues causing delays in the consenting process in Scotland.

Finally, there is a risk that this does not expedite the decision-making process committed to in the Onshore Wind Sector Deal, especially if the goal of streamlining projects 'in planning' is not as successful as hoped.

In addition, the proposals themselves have limitations:

- **Timelines:** For the proposals to address concerns around long consenting timelines, it will be critical that clear timescales for determinations and pre-consultations be incorporated.

- **Flexibility:** We agree that formalising the consultation process can benefit the process. However, industry urges a level of flexibility concerning how consultations are conducted. Expecting a fixed round of consultation or mandatory public meetings, which can be challenging for all stakeholders to attend, may not provide the meaningful level of input that will be required.

  Developers already use several other ways to engage with communities that have been very useful in reaching a wider audience, such as targeted advertisement on Facebook, offering virtual meetings or hosting webinars. Instead of being prescriptive about the level of engagement, it will be critical to ensure that developers gather constructive feedback that will be valuable for the development of a project.

- **Resourcing:** Delays in the current consenting process can often be attributed to overstretched, under-resourced, or insufficiently experienced statutory bodies. Therefore, it is essential for all public bodies involved to ensure that an effective and timely planning system throughout the UK is well-resourced and that existing resources are used as efficiently and effectively as possible. We are concerned that increased pre-application requirements could cause further delays without significant additional resources and increased efficiency of existing resources.

- **Engagement and feedback:** For the proposals to positively impact the process, consultees must provide relevant, bespoke, and evidence-based advice at an early stage and maintain consistency throughout. Statutory consultees should furthermore be held accountable for providing meaningful engagement with applicants.

Finally, we support the digitalisation of processes and planning materials as another strategy to increase the efficiency of existing resources by ensuring that they are signposted and standardised where possible. Pre-application consultation should be mainly a digital exercise, with paper copies only being provided on request. This would facilitate general as well as additional targeted consultations. Generally, digital approaches adopted during the pandemic have worked well and should be retained. Automatic alerts of examination hearings and deadlines would be helpful, as well as automated online subscriptions to hearings.

We would like to highlight a project underway in Europe. In 2023, WindEurope, AWS and Accenture developed a cloud-based, open-source solution that could help public administration and local communities embrace and speed up the whole permitting process. Further information on EasyPermits can be found here: https://windeurope.org/easypermits/

PROPOSAL 2: APPLICATION PROCEDURES

Application Procedures

Application information requirements

1. Do you agree with the proposal for increased information requirements in applications? Why do you agree/not agree? How might it impact you and/or your organisation?

While we recognise the intention behind this proposal, we would like to highlight that applications are already substantive, including all relevant information. We are furthermore concerned about the additional time it will require to provide increased information at an earlier stage and the risk of duplication.

A clear, standardised, and well-defined set of information requirements will contribute to a more efficient and effective consenting process; it will be important that the proposal will guarantee that:

- Regulations set clear information requirements and support their consistent and proportionate application. They are supported by an efficient validation process and an objective pathway to resolve any disputes arising regarding the adequacy of applications. This is important to avoid delays in processing applications where parties hold conflicting views on the adequacy of information submitted.

- Increased information required is proportional and clearly explains the reasoning behind requests. Setting out such requirements in advance will help ensure that requirements will not be blindly applied.
- Coordinating and aligning the consenting regimes for offshore projects is essential to streamlining the process and avoiding redundant submissions.
- This guidance should emphasise avoiding redundant submissions by explicitly signposting to existing documents like EIA reports and planning statements where the required information is already provided.

Finally, according to this consultation, 43% of onshore applications since 2007 have been submitted in a substandard form. It is unclear from the application which criteria have been applied through this analysis. We want to highlight the evolution of the sector since 2007. Any additional information on the data that has fed into this analysis would be very useful to clarify why such applications have been regarded as substandard.

2. Do you agree with the proposal to set out detailed information requirements in regulations? Why do you agree/not agree? How might it impact you and/or your organisation?

For offshore projects, developers already provide a substantial amount of information as part of the Marine License application process. Ensuring that the increased information requirements for Electricity Act applications do not lead to duplication of effort and unnecessary burdens is crucial. Coordination and alignment between the consenting regimes for offshore projects are essential to streamline the process and avoid redundant submissions.

In addition, we are concerned that the proposed list of information requirements repeats information already supplied in all Section 36 applications for onshore wind farms, for example:

- The Design Evolution chapter in an EIA Report and the Design and Access Statement provides a statement on the alternative approaches considered.
- Planning Statements, Policy chapters and Socio-Economic Benefit Statements all provide the ECU with the benefits and needs of a proposal.

Therefore, we are unclear about the need and purpose of reforming legislation to mandate them.

Application input from statutory consultees

1. What are the reforms that would be most impactful in enabling your organisation to provide timely input on section 36 and section 37 applications?

We are concerned that the proposed changes will burden statutory consultees more. They don't have the resources to do their current work, much less the additional requirements this proposal would impose.

We prefer more discipline around when and how statutory consultees respond to proposals in the pre-application process and applications. Today there is inconsistency around which statutory consultees provide feedback during pre-application phases, which ones don't provide feedback until after an application has been submitted and staying on required deadlines. A key driver for slowing down S36 and S37 applications is that statutory consultees and the ECU do not all have the resources or the desire to engage at an early stage. However, most developers attempt to engage them early.

An important aspect of reform would be setting timeframes for response and providing recovery on behalf of the application should timeframes not be met. Statutory consultees should not be able to ask for more time, as they repeatedly do currently.

Rather than the pre-application phase laid out in this proposal, it would be more effective if statutory consultees all engaged in effective project scoping so that developers can consider ecosystem solutions. This would fulfil NPF4's goal of enhancing the environment.

Improve Clarity and Consistency of Guidance: Existing guidance must be updated to reflect current industry practices and technological advancements. Clear, concise, and readily accessible guidance would streamline the process and reduce ambiguity, leading to faster responses.

Address Resource Constraints within Statutory Consultees: Ensuring they have adequate staffing, expertise, and resources is vital for efficient and timely application handling. This might involve considering recruiting technical experts to bolster their capabilities in handling complex technical aspects of applications.

2. What are the advantages and drawbacks of the options set out under Proposed Changes? How might your organisation benefit from the proposed forum and framework?

While beneficial in the long term, establishing new forums and frameworks could initially create additional work for already stretched resources. Their effectiveness will be limited if underlying resource constraints within statutory consultees are not addressed. Careful planning and resource allocation are crucial to mitigate this.

3. What specialist or additional support could the Scottish Government's Energy Consents Unit provide to facilitate the statutory consultees' ability to respond?

Ringfenced financial resources would help support statutory consultees' ability to do their work effectively. Providing additional support and funding to statutory consultees shouldn't be limited to specialist support for improving the management of highly technical matters, as suggested in proposed change #3. As a matter of urgency, there should also be additional all-round support to assist caseloads for statutory bodies.

Providing a pool of officers who can cover central topic areas in which LPAs may not have expertise would be helpful. If the Planning Hub effectively provides this expertise to LPAs, it could be a valuable tool for speeding up timeframes.

The ECU should consider bolstering its technical expertise to effectively support statutory consultees in evaluating complex projects. This could involve recruiting specialists with relevant experience.

Developers could work with the Scottish Government and other stakeholders through industry forums to update and clarify guidance documents, focusing on streamlining information requirements and submission procedures. This collaborative approach would help address inconsistencies and ambiguities, ensuring smoother interactions between applicants and statutory consultees.

4. Would new time limits help your organisation to prioritise its resources to provide the necessary input to the application process?

New time limits for input into the application process would be welcomed if all consultees were held accountable to them. Time limits are not complied with today, and nothing in this proposal would change that.

Amendments to applications

1. Do you agree with implementing a limit for amendments to applications? Why do you agree/not agree? How might it impact you/your organisation?

We recognise that a limit on amendments could help address current issues and frontload meaningful engagement and issue resolution in the pre-application and application statutory consultation phases. However, to benefit from a limit, the availability of high-quality advice from statutory consultees and other important stakeholders should be a key consideration in setting any deadline.

In addition, the following examples illustrate the benefit of amendments to an application:

- In most cases, relatively minor changes are required at later stages. Such stages usually aim to prevent an objection and subsequent public local inquiry.

- In some instances, consultees have not provided adequate advice per the outlined timeframes. The ability to make changes later to respond is in all parties' interest.

At this stage, we are not fully supportive of implementing a limit for application amendments. Should a limit for amendments be implemented, the following criteria will need to be fulfilled:

- It must have a clear rationale and be carefully managed.
- It should kick in only after all consultees have responded and the developer has had a chance to adapt the proposal accordingly. In many instances, changes to an application post-submission by one statutory consultee can contradict suggestions by another, which requires discussion with the planning authority to determine the balanced position.
- A 'substantive amendment' must be clearly defined and agreed upon upfront. A clear distinction between substantive and non-substantive amendments would prevent ambiguity and potential disagreements during the application process.

There are numerous examples of externalities for which developers should not be penalised by the consent process. This is alluded to in the variations section of the consultation document, where it is acknowledged that large-scale infrastructure projects are long-term where conditions and technology can change. Changes include, but are not limited to:

- Power price fluctuations
- Commodity pricing of energy
- Updated guidance by statutory consultees
- Updated policy e.g. NPF4
- Delays in decision-making and grid connection dates
- Turbine manufacturing market reacting to advances in technology
- Aircraft detection systems for aviation lighting
- Changes to ornithology baselines, particularly the establishment of golden eagle habitats
- Land rights changes
- New designations such as National Parks (e.g. Galloway), important landscapes, World Heritage Sites, SSSIs and SACs, etc

Because of delays in the grid consenting and build process, a wind farm will likely not be constructed or fully commissioned for several years after a planning submission. This could lock developers into outdated technology with no options for optimising the scheme. These outside forces often drive amendments to applications.

Legislating a limit on the number of amendments that can be made to applications is not conducive to the iterative nature of these developments and could prove particularly counterproductive to the deliverability of onshore wind farm projects.

With the best intentions, developers cannot always guarantee the PAC process will work well. If objections from statutory consultees can be addressed, developers should have every opportunity to do so so that the project does not have to start over in the planning process. There is also a risk of a JR from non-statutory consultees if an applicant cannot amend a proposal in response to post-PAC feedback.

There needs to be, at a minimum, one round of addressing the concerns that come from statutory consultees through this process. Scottish Ministers should not be able to create a limit on the number of rounds of amendments until all statutory consultees have responded to the application. Amendments arising from recommendations by statutory consultees should be accommodated even if they fall outside the set timeframe.

Many objections cannot be anticipated before an application is submitted. And some consultees do not engage in detail at the pre-application stage. It is in all parties' best interest to allow developers to amend project applications to address consultee concerns. This is a helpful part of the application process. While keeping timelines short for the application process is everyone's goal, it should not be at the expense of a project being able to meet consultee concerns.

2. Do you agree the limit should be determined by Scottish Ministers on a case-by-case basis? Why do you agree/not agree? How might it impact you/your organisation?

We disagree with providing blanket authority to Scottish Ministers to stop a process of developers working to meet statutory consultee needs. Until all responses have been received, it will be impossible to know if any or what type of amendments may be required to resolve objections. However, we would like to propose strict time limits for amendment submission and response, ensuring all parties work collaboratively and constructively to try and find solutions.

Public inquiries

1. What is you or your organisation's experience of public inquiries? What are the advantages? What are the disadvantages?

A public local inquiry can be a helpful tool in defining and resolving complex matters and in circumstances where parties cannot reach an agreement. A meaningful debate is essential in reaching balanced decisions on nationally important infrastructure projects.

In addition, the PLI process can serve as a valuable tool for clarifying policy, particularly with NPF4 and policies that have been untested on the ground. This process creates a precedent that helps guide developers and statutory consultees for future applications. In addition,

inquiry sessions can be beneficial when there are technical topics where the Reporter needs to carefully examine issues in a way that cannot happen in a public hearing.

However, the consultation does not recognise the increasing scope of Public Local Inquiries and its growing challenge to the consenting process.

According to ECU analysis, PLIs are by far the biggest driver of determination periods (an extra 1-2 years). In addition, LPAs were the sole cause of 62% of PLIs and were involved in 85% overall.

Industry is concerned that PLIs have become disproportionate and, instead of focusing on a narrow set of unresolved objections, can become a process that rehashes a wide range of issues previously resolved in the planning process. We would encourage reforms to PLI to include limiting the scope to unresolved issues. Removing mandatory PLIs, would furthermore be in line with the recommendations from the UK's Electricity Networks Commissioner, Nick Winser, and should be taken forward as part of the reform package:

The public should still be able to express their concerns throughout this process. That could be achieved through public sessions rather than formal sessions. Without the public's ability to have a voice in this process, they may not accept the final result.

2. Do you agree with the proposed 'examination' process suggested? Why do you agree/not agree? How might it impact you/your organisation?

Public Local Inquiries have become disproportionate in the past few years. PLIs should focus on a narrow set of specific unresolved objections or issues that are material to the consenting decision. In addition, the timescales for reports or recommendations to be completed, reviewed, or accepted are highly unpredictable and prone to significant delay.

To regain a sense of proportionality and ensure any examination adds value to the consenting process, the Act should be amended to limit the scope of examinations to only the consideration of unresolved objections or issues, as determined by the appointed Reporter. This would mirror existing provisions within Regulation 17 of The Town and Country Planning (Development Planning) (Scotland) Regulations 2023. Furthermore, clear guidance on an expected date or outcome of an examination is needed to avoid any unnecessary delays.

While we would like to retain the right for applicants to request a PLI, some reforms would help speed up the process. Moving more towards written representations is a positive change, less resource-intensive and costly for all parties, while retaining the flexibility for the Reporter to elect to hold a Public Inquiry if this is in the public interest.

In many cases, the key issues and concerns regarding a project can be effectively addressed through comprehensive written submissions from the applicant, statutory consultees, and members of the public. An oral process via a Hearing could be used where the Reporter wishes to test evidence further, and full inquiry sessions should be required to test very complex technical evidence. This should be for the Reporter to determine, as with current appeal procedures under the Section 36 legislative framework, with input from the developer.

By investing so much money in the development of a proposal up until this stage, a developer's interest in a full examination should be heavily weighted. This approach reduces costs, minimises delays, and allows for more focused and evidence-based decision-making.

PROPOSAL 3: VARIATIONS

Variations of network projects

1. Do you agree with the proposal to prescribe a clear statutory process under which variations to network projects may be granted? Why do you agree/not agree? How might it impact you/your organisation?

This will depend on the technology.

We welcome variations, particularly for offshore projects.

Variations of consents without an application

1. Do you agree with the proposal to give the Scottish Government the ability to vary, suspend or revoke consents, without an application having been made in the circumstances set out above? Why do you agree/not agree? How might it impact you or your organisation?

We do not agree that the Scottish Government should be able to vary, suspend or revoke consent as proposed in this consultation.

We recognise that the proposed powers would allow correcting errors in the drafting of consent without generating an administrative burden. Therefore, we would support the ability to 'modify' a consent to avoid S36C applications for minor variations or errors to speed up the planning process.

However, we are concerned that the proposed measures would appear to give the Scottish Government the ability to modify, suspend, or revoke consents where environmental circumstances have changed, particularly concerning subjective environmental grounds. This would introduce uncertainty and weaken investor confidence.

This is particularly pertinent if new requirements are applied to consented projects that already have their business model in place or have been constructed and are operational. It could potentially increase the funding costs associated with delivering such projects. An example of this could be the inscription of a World Heritage Site after consent has been provided to a proposal. Revoking consent after the fact would be unfair because the policy landscape has changed. Ministers should not have the scope to change the planning consent retrospectively without requiring the consent of the operator or without being required to pay full compensation for the value of the consent.

It should be noted that section 30 of The Marine Scotland Act 2010 already provides procedures for a formal process before such a decision is made for offshore projects. For onshore proposals, this could significantly harm project feasibility and investor confidence.

The ability to have consent revoked would impact long-term investment in projects, long-term maintenance and service agreements, and the project's financial feasibility if turbines needed to be curtailed to accommodate future mitigation measures. Projects will go into a final investment with a validated model and a validated energy yield, and changes to the model or the yield after the final investment decision would impact the financial feasibility of the projects after the fact. This uncertainty could have a significant cooling effect on investment in Scotland.

This proposal will require more clarity to address those concerns before being taken forward. Any proposal to allow for revocation of consent needs to have proper safeguards in place to prevent abuse. The power to ‘suspend or revoke’ consent based on a change in environmental or technical information is unreasonable. In the Planning Act, the ability to revoke consent is the exception, and there are many parameters around when and how revocation can be invoked.

We are concerned that people could use this to object to onshore renewable energy projects after they have been built. Rather than going through the planning authority in the current process, they could request that the LPA request a revocation of consent. Without a compensation provision, the uncertainty this would create for renewable energy projects would be a significant issue and ultimately harm the Scottish economy.

2. Do you believe there should be any other reasons the Scottish Government should be able to vary, suspend or revoke consents? What reasons are these?

No.

PROPOSAL 4: FEES FOR NECESSARY WAYLEAVES

Fees for necessary wayleaves

1. Do you agree with the principle of introducing a fee for the Scottish Government to process necessary wayleaves applications? Why do you agree/not agree? How might it impact you or your organisation?

We agree with introducing a fee, but all fees proposed here should be ringfenced and guarantee service improvements.

2. Do you agree that the fee amount should be based on the principle of full cost recovery, in accordance with Managing Public Money and the Scottish Public Finance Manual? Why do you agree/not agree? How might it impact you or your organisation?

No response.

PROPOSAL 5: STATUTORY APPEALS AND JUDICIAL PROCEEDINGS

Statutory appeals and judicial proceedings

1. Do you agree that a statutory appeal rather than a judicial review process should be used for challenging the onshore electricity consenting decisions of Scottish Ministers? Why do you agree/not agree? How might it impact you or your organisation?

We agree with the proposal that a statutory appeal rather than a judicial review process should be used to challenge Scottish Ministers' onshore electricity consenting decisions. The number of judicial review processes for planning applications has increased in the last few years. The long and complex timescales of judicial reviews are adding another barrier to new projects. Statutory appeal has several benefits, including short timelines and stricter criteria.

Finally, adopting a unified statutory appeal process for both onshore and offshore projects would streamline the system, making it more accessible and efficient.

2. Do you agree there should be a time limit of 6 weeks for initiating a challenge to a consenting decision of Scottish Ministers for onshore electricity infrastructure? Why do you agree/not agree? How might it impact you or your organisation?

We welcome the proposal to introduce a six-week time limit for initiating a challenge to a consenting decision of Scottish Ministers for onshore electricity infrastructure.

This is a welcome change that addresses an anomaly: the challenge period offshore is 6 weeks, but 3 months onshore. This will help speed up developers’ ability to reach a final investment decision.

Introducing a clear timeline will provide more certainty for projects on when to expect a challenge by at the latest. Six weeks should furthermore be sufficient time to raise concerns. Concerns raised at a later stage will add uncertainty that could inadvertently delay projects.

Overall, clear timelines on the consenting process, including from statutory consultants, will provide clarity for all parties involved.

PROPOSAL 6: TRANSITIONAL ARRANGEMENTS

Transitional arrangements

1. Do you agree with the above proposal for transitional arrangements? Why do you agree/not agree? What impact would this have on you/your organisation?

We disagree with the proposal for transitional agreements.

Applications have been developed and submitted using the current process and should not be penalised for their timing.

If a project is ready for submission under the current process as these rules go into place, requiring it to comply with this new pre-application process would mean that developers would have to redo the pre-application process, which will be costly and time consuming.

One key goal of the consultation process is seeking feedback on proposals and refining them through the development process. If developers have already committed to months or years of engagement for projects under the current process, requiring them to redo that process would not increase engagement. Still, it would increase time and cost for the development portion of the project. This may alienate community members if they are double consulted on the same project for no real purpose or change in outcome.

This would seriously undermine investor confidence as well as put what would otherwise have been viable projects at risk.

We recommend the following process:

- Limited transitional arrangements should be in place to inadvertently delay submissions of Section 36 applications in 2025.
- A grace period of twelve months should be introduced from the enactment of the legislative changes and before the preliminary information report consultation stage is required for projects which have already completed EIA Scoping and are intended to be submitted in 2025. We are concerned that implementing the changes for projects that have completed EIA scoping or are currently going through the process could delay those projects by four to six months, as developers would have to undertake a consultation on a Preliminary Report.

PROPOSAL 7: THE PACKAGE OF REFORMS

The package of reforms

1. Having read the consultation, do you agree with the reforms as a package? Why do you agree/not agree? What impact would they have on you/your organisation?

Industry recognises the ambitions of the reform package. While proposed measures regarding pre-application requirements are reasonable in isolation, when considered in their entirety, we are concerned that the new requirements frontload rather than streamline the work required in the planning stage. Because developers currently participate in pre-application processes where available, we do not believe creating an administratively burdensome pre-application process serves the interest of a shorter application process.

While frontloading additional work into the pre-application process may allow for the ECU to spend less time on an application, it does not meet the spirit of expediting the planning process, nor does it expedite decision-making.

To overcome the challenges of consenting in Scotland, it will be essential to look at the broader challenges of the consenting process, as highlighted throughout this response. In addition to broader reforms, for example, around EIA, statutory consultees, Local Planning Authorities, and the Marine Directorate need to be well-resourced and engage with the industry promptly and consistently. For offshore wind, the main reason for a delay in decisions is the issues with the derogation provisions within the Habitat Regulations and the requirement for like-for-like compensation, which does not exist.

We are concerned that the proposal in this consultation would create an overly bureaucratic and administratively onerous process that does not address the core cause of lengthy application processes.

Therefore, should the reforms be taken forward, it will be essential to clarify how and when applications will be determined, which should include information about the process of the statutory bodies. Additionally, it will be critical that the transitional arrangement and changes to the current process do not inadvertently delay projects that have advanced post the scoping stage.

Onshore–specific feedback and additional proposal

Concerning onshore developments, this reform package misses the opportunity to provide renewable developers with the ability to secure land rights in Scotland. Currently, developers are required to create leases individually with landowners for oversail and overrun rights. As land becomes scarcer for renewable energy developments, projects can have as many as

fifty leases for oversail and overrun. Landowners have begun holding developers to ransom for payments the proposed projects can't financially support. These negotiations are putting projects at risk

Currently, the only solution for developers is a compulsory purchase order, which is not fit for purpose for this application. It is too blunt a tool and would give the developer who uses it full land rights, when multiple developers will likely need access to those same pinch points. The state should provide an option for a remedy that is below the land acquisition. In England, developers can occupy land for the purpose of construction, while not acquiring the land. There is no mechanism for this in Scotland.

We recommend the creation of a new provision in the Electricity Act allowing developers to apply to Scottish Ministers for short-term oversail and overrun wayleave rights when required, during the construction process and for any repairs during the lifetime of the wind farm. This should be subject to compensation payment and land reinstatement after use. Compensation should be determined on a statutory basis. Because of the need to deploy renewable energy projects quickly, we suggest removing any time-bound requirement for negotiations and require that negotiations have been done with landowners.

Additional proposal to address an essential element of the consenting process:

The consultation overlooks an essential element of consenting processes under the Electricity Act 1989: the basis and timing of Ministerial determinations on applications at the end of the process.

Whilst the inherent flexibility within the Act to allow decisions to reflect the unique circumstances of individual cases is to be welcomed and should not be removed, we observe that there is presently nothing within the Act to guide either the timing or basis of decision-making to ensure consistency, transparency, equity, and predictability.

This differs markedly from other consenting legislative frameworks and undermines confidence in the system, especially during the often lengthy period following the completion of a PLI when it is not known when or on what basis a Ministerial decision will be made. The absence of any guidelines on determinations under the Electricity Act 1989 also means that it is now one of only very few consenting regimes across the UK that are not 'plan-led'. This is at odds with the rest of Scotland's plan-led system, undermines transparency and leads to inconsistent and unpredictable outcomes, including, for example, through the application of different policies from the National Planning Framework 4, and to differing extents, on the face of Ministerial decision notices for cases which share similar attributes.

To address this and provide greater certainty, modest legislative amendments could clarify the basis of determinations and introduce a time limit on Ministerial decision-making following the making of consenting recommendations.

As a wide range of legislation and policies are relevant to the determination of consenting applications for energy infrastructure, unlike Section 25 of the Town and Country Planning (Scotland) Act 1997, which focuses on the statutory Development Plan, it would be more appropriate to require determinations on applications to be made “in accordance with applicable legislation and policies, unless relevant and important considerations indicate otherwise”. This nuanced amendment would prevent determinations from being perceived to be subjective and would help to promote consistency concerning the application of relevant plans and policies whilst retaining sufficient latitude for ministers to reflect the unique circumstances of each case.

2. What steps could we take to ensure the project planning process (including the pre application stage) can be completed as fast as possible?

To ensure the project planning process can be completed as fast as possible, we propose the following additional solutions:

- Clear timelines and milestones**:** Establishing clear timelines for each stage of the pre-application process, including consultation periods and information submission deadlines, would enhance predictability and enable efficient project scheduling.

- Digital submission and tracking: Implementing a digital application submission and tracking platform would enable efficient information management and communication, reducing processing times.

- Adequate Resources for Statutory Consultees: Adequate resources for statutory consultees are essential to ensure timely responses to consultations. This includes upskilling staff where necessary.

- Update existing guidance: Clear, concise, and readily accessible guidance would streamline the process and reduce ambiguity, leading to faster responses.

PROPOSAL 8: EVIDENCE AND ANALYSIS

Evidence and analysis

1) Do you agree with the rationale for intervention? Are there any points we have missed?

We disagree.

While we agree that action is needed to shorten the planning process for renewable energy projects, this proposal does not focus on the pinch points that currently slow down applications.

The proposal in this consultation suggests that developers are currently not providing complete applications, referencing outdated data. However, industry best practices have moved on significantly since 2007.

As highlighted in our response, onshore wind developers have committed to submitting complete applications as part of the Scottish Onshore Wind Sector Deal. Meanwhile, pre-application is already common practice for offshore wind developers.

We are concerned that the proposals put forward in this consultation do not address the main reasons for longer determination timelines – as outlined throughout the consultation, which include:

- The lack of a proportionate EIA and challenges around HRA.
- The lack of adequate resourcing of statutory consultees.
- The lack of meaningful pre-application engagement and feedback, even where pre-application services are provided.

We are concerned that, in light of under-resourced statutory consultees, the proposal will require more resources and time to adjust to and implement the proposals.

ANNEX C:

Briefing on the Eskdalemuir Seismic Array

Briefing Note on the Eskdalemuir Seismic Array
Planning and Infrastructure Bill 2025

Background on the Eskdalemuir Seismic Array and Planning for Onshore Wind renewables.

1. The Eskdalemuir Seismic Array (the Array) is maintained by the Ministry of Defence (MOD) for the UK Government under the United Nations Treaty to prevent the proliferation of nuclear weapons. It consists of a number of seismic sensors installed underground in a very quiet seismic environment in southwestern Scotland. The Array can hear nuclear tests around the globe. Its effectiveness is dependent on the maintenance of a low level of seismic noise so as to not compromise the Array's ability to pick up traces of such tests.

2. It is known that wind turbines generate seismic noise through vibration. In 2005, a ceiling of 0.336 nanometres (nm) of seismic noise from all wind turbines within 50km of the Array was set by the MOD following technical studies. This ceiling remains and is unlikely to be revisited.

3. In 2005, the Scottish and UK Governments made Technical Directions which required consultation with the MOD before any planning permission could be granted for wind turbine development within 50km of the Array (the consultation zone). An 'exclusion zone' of 10km around the Array was also determined, where no onshore wind turbines consent could be granted (see paragraph 8.2). These Regulations apply to applications under the Planning Acts and have been applied as a matter of policy to section 36 of the Electricity Act (1989).

4. In 2018, an application for a wind farm within 15km of the Array was made, to which the MOD objected on the basis that the 0.336nm ceiling would be breached. The MOD determined that the ceiling was breached by using the 2014 algorithm created by Xi Engineering Consultants' and the MOD. Although that application was refused in 2024 for local environmental reasons, as well as because of the MOD's concern, other applications had by then been made within the consultation zone. Since the 2018 application that breached the 0.336nm ceiling, the MOD has objected to all the current applications for wind farms within the consultation zone.

5. **There are now applications for more than 3GW of onshore wind within the consultation zone. While some may be refused for reasons other than the Array, unlocking the consultation zone for onshore wind development represents the single biggest win available for UK Government onshore wind policy. It is estimated, on the basis of the technical work referred to in paragraph 7, that an additional 5-6GW of new capacity can be realised, including from projects now in planning or scoping.**

Work to protect the Array and maximise renewable energy development within the consultation zone.

6. The Eskdalemuir Working Group (EWG) was established by the UK and Scottish Governments to unlock new onshore wind capacity within the consultation zone. The MOD sits on the EWG.

7. The EWG has commissioned underpinning technical studies in 5 phases. Reports completing the final two phases of work are currently with the MOD for verification and are key building blocks for unlocking additional capacity for new development within the consultation zone. The remaining steps to be completed through technical and other work to enable further consents to be granted are set out in the Annex to this note.

8. In addition to the technical work there are two tasks to be completed before new capacity can be realised within the Zone:

   8.1 The MOD is bringing forward a fresh approach to safeguarding the Array through the planning process. This work is in hand and expected to be finalised in 2025.

   8.2 The UK and Scottish Governments will consult upon and then finalise their approach to the optimisation of development with the consultation zone. That process must await the completion of the audit currently in progress by the MOD to calculate the headroom available under the 0.336nm ceiling. Completion of that work will enable the publication of a Seismic Impact Limit (SIL). This will be the foundation for ring fencing each development within the consultation zone so that no individual project can use a disproportionate level of seismic budget, as happened in 2018 (see paragraph 4). Each development will have a limit imposed on its use of the available headroom. This will preserve the seismic budget and enable optimisation of onshore wind development through the consultation zone.

   8.3 Since a single turbine 10km from the Array uses the equivalent amount of seismic budget as ~5000 of the same turbine at 50km, it is agreed by the EWG that an exclusion zone of 15km from the Array is appropriate to achieve optimisation. The UK and Scottish Governments will also need to publish this as a matter of policy following the consultation on optimisation.

The need for an amendment to the Planning and Infrastructure Bill and further regulations.

9. The MOD has made it clear that it will not rely on a SIL made solely by policy. It requires new law to secure the SIL if it is to rely upon it and withhold objections to new development. In the absence of new law, the MOD will continue to calculate headroom as if there were no ring fencing, meaning that a single project close to the Array, such as those proposed in 2018 would deny any

development within the consultation zone. This will perpetuate the inability to develop onshore wind within the consultation zone.

10. Industry agrees with the MOD that the SIL must be secured by Regulation. This provides certainty and would prevent proposals that would defy the SIL from having any prospect of success.

11. The MOD and industry are also of the view that the new law which replaces the existing Directions (see paragraph 3) should impose an exclusion zone of 15km within the consultation zone to ensure no individual project can prevent additional onshore wind projects. The replacement Regulations should reimpose the requirement to consult with the MOD on all applications under the Planning Acts and the Electricity Act. It is noted that, since the current Directions only apply as a matter of law to applications proceeding under the Planning Acts, new Regulations will be required so as to capture the Electricity Act in any event.

12. The Regulations required under the Planning Acts can be made under existing law.

13. **However, the Electricity Act 1989 contains no primary 'hook' on which to base Regulations, including the Regulation required to compel consultation on applications with the MOD. Clause14 of the Bill proposes to enable the Secretary of State and the Scottish Ministers to make regulations for a number of purposes. What is required to optimise onshore wind development near the Array is an additional sub-clause to clause 14.**

    13.1 This sub-clause could follow the approach of Regulation 32 of The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013, which states:

    13.2 *'The Scottish Ministers may by a direction given under this regulation restrict the grant of planning permission by a planning authority, either indefinitely or during such period as may be specified in the direction, in respect of any development or any class of development, as may be so specified'.*

    13.3 Adapting the approach for the purposes of the Electricity Act (1989), we recommend that the clause be written as follows:

    13.4 *'Restrictions on the grant of consent, either indefinitely or during such period as may be specified in the regulation, in respect of any development as may be so specified'.*

Annex: Remaining technical work

14. Xi Engineering Consultants was commissioned by the AIFCL to provide the technical work and analysis to support of the MOD managing onshore wind development within the consultation zone. Some of the remaining technical work is work Xi Engineering Consultants has yet to complete and requires subsequent verification by MOD .

15. Verification by the MOD of the XI Engineering Consultants' phases 4 and 5 conclusions, which analyse the cumulative seismic impact of consented and proposed wind farms within the consultation zone. This verification will conclude how much headroom for additional development exists within the consultation zone, subject to step 16(b). It is not known when this verification work will be complete.

16. Verification by the MOD of the precise level of headroom for new development within the consultation zone. This step involves calculating the total seismic ground vibrations of all operational and consented turbines and looking at each permission granted to determine (a) how much of the permission has been built, (b) if what has been built accords with the MOD's record of planning consultation at the time of the application and (c) which permission has been implemented in cases where there may be two or more permissions for development. This work has been commissioned, but it is not known when it will be complete.

17. The development by Xi Engineering Consultants of a tool for use by the MOD to manage its protection of the Array in the context of further wind turbine development within the consultation zone. The tool will minimise MOD resource required to process applications and maintain records for all turbines in the 50km consultation zone. This tool will be run by the MOD on its own secure server and so is separate from that described in paragraph 18. It will use verified data from steps 16(a) and 16(b) and will be used to process consultations on every application for consent. XI Engineering Consultants has confirmed that this tool can be produced for review by the MOD in a matter of weeks after the work is instructed.

18. The development by Xi Engineering Consultants of an open access management tool to enable developers and planning stakeholders to understand how much headroom is available and to calculate seismic requirements for projects. This tool will enable transparency within industry and reduce Inquiries and associated MOD resource to process these. There are some actions ancillary to the creation of this tool which will also use verified MOD data from paragraph 17. This tool will enable developers to calculate the seismic budget for developments and tell SIL affected projects (see paragraph 8.2 for an explanation of how this concept would be used) whether or not sufficient budget exists. The timescale for this work package is roughly the same as for the MOD management tool.

19. Confirmation by the MOD of its approach to the protection of the Array in the Electricity Act and Planning Act systems following completion of the consultation is described in paragraph 8.

20. Publication of the Scottish Government's approach to the optimisation of the use of headroom, including a review of the current policy based 10km exclusion zone around the Array. This exclusion zone is currently proposed to be extended to 15km, in recognition that projects closer to the Array use exponentially more

available headroom than projects much further from it. One turbine at 10km from the Array will use the same seismic capacity as about 5000 turbines of the same type at 50km. This approach to optimisation is also likely to propose that the disproportionate use of seismic budget by projects closer to the Array needs to be limited by policy or law through a Seismic Impact Limit (SIL), which will apply to each development. The SIL will limit the use of capacity by projects close to the edge of the proposed 15km exclusion zone so that their development cannot adversely affect the use of capacity by other projects. It will likely impact projects as far as 22-24km from the Array. Beyond that distance, the SIL will have little or no effect, although it will still be applied in fairness to all projects.

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