

LINK Consultation Response

Enabling powers for Scotland's Environmental Impact Assessment regimes & Habitats Regulations
May 2024



Scottish
Environment
LINK

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Introduction to Scottish Environment LINK

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 40 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

LINK provides a forum for these organisations, enabling informed debate, assisting co-operation within the voluntary sector, and acting as a strong voice for the environment. Acting at local, national and international levels, LINK aims to ensure that the environmental community participates in the development of policy and legislation affecting Scotland.

LINK works mainly through groups of members working together on topics of mutual interest, exploring the issues and developing advocacy to promote sustainable development, respecting environmental limits.

Response

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

No

LINK members agree that Scottish law must have provisions for environmental protection that are appropriate for the current environmental context, including mitigating and adapting to the effects of climate change and reversing biodiversity loss. We also welcome the Scottish Government's commitment to 'keep pace' with the EU's environmental standards. However, the lack of clarity in the proposals for these enabling powers is concerning for several reasons:

- there are already powers in Scottish legislation that could be used to extend the current EIA provisions, namely the European Union (Continuity) (Scotland) Act 2021, which enables the Scottish Government to keep pace with any changes made to the EIA Directive and any other assimilated law until 2031.
- it is not clear why the EIA Regimes and Habitats Regulations are the only frameworks that are considered in need of these enabling powers, and not other aspects of assimilated law.
- there is a lack of detail on what these potentially extensive powers could be used for
- the lack of assurance around appropriate scrutiny of any changes these powers would be used to make
- the potential influence of stakeholders who may wish to weaken the current standards for assessment for the purposes of economic development
- The exclusion of electricity works from a consultation on EIA is a major omission. This is not only due to the scale and pace of these works across Scotland, but also due to the links with other EIA regimes that are included in the consultation. For example, marine licensing would be



required for at least some, if not all, offshore wind farms that require connection to onshore transmission infrastructure.

LINK members are concerned about the potential erosion of provisions underpinning EIA Regimes and other EU transposed law. Clarity on what the powers could be used for in the long-term is needed. As well as flexibility to respond to future requirements, new provisions must include proper safeguards for nature and people, and should ensure that environmental protection in Scotland is of equivalent or higher standards to the EU and rest of the world.

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

Yes

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

Please provide examples and any information which you think would be useful to support your views.

If enabling powers such as those proposed in this consultation were taken forward, appropriate safeguards must be put in place to ensure that the current standards of environmental protection are maintained or exceeded. LINK members are calling for a 'non-regression' stipulation to be applied to these powers to ensure that any regulations do not lower the levels of protection or assessment currently provided by the EIA Regime or Habitats Regulations. LINK members also agree that there should be independently assessed criteria to ensure the 'non-regression' requirement is met.

Any use of the enabling powers which are proposed in this consultation must be subject to mandatory public participation requirements. Article 8 of the Aarhus Convention sets out the rights of the public to participate in the preparation of executive regulations. In order for the enabling powers to be consistent with the requirements of the Aarhus Convention, mandatory public participation procedures must ensure that (a) draft regulations are published at the earliest possible stage and while options are still open, (b) time frames are specified which are sufficient to ensure effective public participation, (c) the public are given the opportunity to comment on the draft regulations and (d) the result of the public participation is taken into account as far as possible. Secondary legislation under the powers should be taken forward with an affirmative procedure to ensure appropriate scrutiny in the Scottish Parliament.

LINK members support the potential transition to a digital system for EIA reports. We agree that effective accountability and enforcement is required for EIA regulations.



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

No

Similar to the concerns raised in our response to Question 1, LINK members think the Scottish Government's justification for these powers, based on the potential need for "legislative reform," is concerning. The consultation paper offers insufficient specific detail on the nature or necessity of such reforms. The Habitats Regulations are critical for protecting Scotland's most valuable natural areas, habitats, and species. If applied rigorously scientific evidence confirms that they can be effective in safeguarding biodiversity.

While we acknowledge the need for some improvements to Scotland's protected areas framework, we believe significant reform of the Habitats Regulations is unnecessary. A more critical issue for effective implementation of HRA is the need to increase knowledge, skills and capacity of consenting authorities, notably Local Planning Authorities, and not the Regulations themselves. Issues around data availability and standards and post-decision monitoring, evaluation and reporting should also be addressed. If reform is pursued, we urge the Scottish Government to provide further detailed information and justification for proposed changes and enact such changes through primary legislation to ensure proper parliamentary scrutiny and stakeholder engagement. This is particularly vital due to the complexity of this area of legislation and the high potential for unintended consequences on ecological systems.

A clear process for individual citation changes in protected areas should be complemented by a wider framework for ensuring adequate conservation across the network. With recent applications seeking derogation under the Habitats Regulations, it's more critical than ever to maintain, not weaken, these vital protections.

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

Yes

6. Do you have views on how we can set the scope of/limits on these enabling powers? Please provide examples and any information which you think would be useful to support your views.

Similar limits to those set out in our response to question 1 and 3 of this response. These proposed powers should be limited by a 'non-regression' clause, be subject to affirmative instruments in Parliament and be subject to reporting to ensure clarity on what the powers are used for.



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Furthermore, where the proposed powers may be used to change the purposes of a European Protected Area such as a change to the boundary or to the features designated for protection within the sites, this should be subject to assessment on national status of protected features.

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

Unsure

It depends on how the powers are used by present or future governments. Environmental protection and safeguarding of ecosystem service benefits for current and future generations are in the public interest. As a general principle, prevention of environmental impact is more cost effective than mitigating or reversing any negative effects. Any actions taken under the proposed enabling powers should be properly assessed and carried out with participation from communities and sectors.

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

Unsure

See response to Question 7.

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

Unsure

See response to Question 7.

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

Unsure

See response to Question 7.





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

Yes

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

Other - Please explain

If you selected 'Other' then please use this space to expand on your answer.

The 1994 Habitats Regulations may impose on those with protected characteristics who work on sites where assessments are undertaken, if those who work on sites are forced to stop while assessments are taking place. If those with protected characteristics are forced to stop work, it could impact on benefits that they may be receiving. For example, a disabled person may have an Access to Work Scheme where Adult Disability Payment is provided on the provision of working, or assistive technology provided to the site of work, and without work, this may have a monetary impact on the individual(s) under this scheme which could perpetuate a poverty cycle. However, if Scenario B is used and amendments can be made based on the needs of those working at sites are monitored, similar to what has been seen with NatureScot where a more accessible version of the register online via SiteLink was used, the answer would be yes.

13. Do you have any further comments you wish to add?

Please provide any further comments.

LINK members are concerned about the potential for these proposed enabling powers to erode future environmental protections. The rationale for wider amending powers in primary legislation for the long term, given that existing aspects of legislation from retained EU law could still be used. LINK members would like more clarity on how these proposed powers could be used in the long term. Any risks should be thoroughly appraised by the Scottish Government.

LINK members would also request clarity on whether the proposals for these enabling powers were developed in consultation with stakeholders or communities, and how the Scottish Government plans to make clear the potential effects of how these powers may be used on different sectors.

LINK members agree that if new legislative provisions are required for EIA Regimes and Habitats Regulations in Scotland, the opportunity should be taken to make them as strong as or better than EU provisions, and should include a 'non regression' clause.



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Specifically for Marine Protected Areas (MPAs), there are a number of recommendations from the recent report¹ by Harrison (2023) that could be considered to improve the way the EIA Regime applies to European Marine Sites and nature conservation MPAs:

- “The EIA regime for marine activities should be reviewed and revised in order to ensure that the EIA process applies to all major activities proposed within NCMPAs and offshore MPAs, thereby requiring publication of appropriate environmental information and opportunities for public participation in the decision-making process.”
- “Guidance on the protection of site integrity under the 2009 and 2010 Acts should be developed in order to clarify the reach of the protection offered by the legislation and to bring the protection in line with the protection offered to European marine sites.”

LINK members support these recommendations, particularly highlighting the second point. Previous LINK representations on MPA management proposals emphasised the importance of considering how activities affect the site integrity as well as the Priority Marine Features (PMFs) for which the site is designated². It is LINK’s view that “the ecological importance of a site, whilst designated for specific features, is greater as a functioning whole than as merely the sum of its parts.” An example of this is how burrowed mud is considered as a habitat, with fisheries management measures largely designed around records of component species (such as sea pens), rather than the complexity of the habitat as a whole, including its importance as a habitat for the commercially important Nephrops, and its key role in long-term carbon storage.

This response was compiled on behalf of LINK Member Organisations and is supported by:

Amphibian and Reptile Conservation
Badenoch & Strathspey Conservation Group
Bat Conservation Trust
Buglife Scotland
Chartered Institute of Ecology and Environmental Management (CIEEM)
Cairngorms Campaign
Froglife Trust (Scotland)
Environmental Rights Centre for Scotland
Hebridean Whale & Dolphin Trust
Marine Conservation Society
Nature Foundation
Plantlife
RSPB Scotland
Scottish Badgers
Scottish Seabird Centre

¹ <https://www.law.ed.ac.uk/news-events/news/professor-james-harrison-publishes-new-MPA-report>

² https://www.scotlink.org/files/documents/ScotLINK_MPA_management_consultation_response_0202151.pdf



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Scottish Wildlife Trust
Soil Association Scotland
Whale and Dolphin Conservation
Woodland Trust
WWF Scotland

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