Cabinet Secretary for Net Zero and Energy
Gillian Martin MSP

Scottish Government
Riaghaltas na h-Alba

T: 0300 244 4000
E: scottish.ministers@gov.scot

Finlay Carson MSP
Convenor
Rural Affairs and Islands Committee
rural.committee@Parliament.Scot

30 May 2025

Dear Finlay,

Thank you for your letter of 27 May regarding parts one and two of the Natural Environment (Scotland) Bill. I have addressed each of your questions, which I have retained in italics, in turn below:

Part 1: Targets for improving biodiversity

Marine targets

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

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

The Scottish Biodiversity Strategy aims to restore and regenerate biodiversity across land, freshwater and seas by 2045. Achieving this requires accelerating large-scale landscape and seascape recovery. Statutory targets for nature restoration are intended to drive cross-government action, including in the marine environment, alongside existing targets frameworks relating to fresh, estuarine and marine waters. Statutory targets would only be able to apply to the inshore marine region (0-12 nautical miles) due to the legislative competence of the Scottish Parliament.

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

The Scottish Parliament does not have legislative competence in respect of Scotland's Exclusive Economic Zone (12 – 200 nautical miles) and so targets set in legislation would

not automatically apply there, without further devolution of legislative powers from the UK Government.

Threatened species topic area

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

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

The policy intention of the target topic "the status of threatened species" is that it will cover more than 'rare species'. As you have highlighted, the policy memorandum for the Bill sets this out. This term comprises of species that are under threat now, species that have populations that are declining or restricted genetic diversity that indicates growing threats to their conservation and species that may potentially be under threat in the future. It is the status of species, not the rarity of species, that is considered important in this instance.

A topic on 'threatened species status' was recommended by the independent experts of the Biodiversity Programme Advisory Group (PAG) as it encompasses internationally understood and agreed metrics on biodiversity related to species, and is consistent with the Scottish Biodiversity Strategy for reporting on the overall status of species in Scotland. The term also links well to internally agreed, comprehensive and scientifically robust approaches to evaluating conservation status of species.

I recognise the concerns expressed by some stakeholders with regards to the potential for a narrower interpretation and I will consider whether it would be possible to provide further clarity, either within the explanatory notes for the Bill or on the face of the Bill itself ahead of Stage 2.

Resourcing biodiversity data

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

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

NatureScot coordinates the monitoring of biodiversity in Scotland to inform the Scottish Government and feeds into the UK's international reporting on, for example, the Global Biodiversity Framework. This monitoring also forms the basis of evaluation of progress against the Scottish Biodiversity Strategy. NatureScot staff are also involved in the development of national, European and Global biodiversity indicators.

NatureScot and the Scottish Government recognise the importance of citizen science biological recording and support Local Record Centres and Recording groups with grant funding. There is a great deal of variability in the level of funding and in the approaches adopted in different areas. Some of these groups, which are often reliant on volunteers, therefore struggle to remain viable and this means that the data and future collection is challenging.

Following the Scottish Biodiversity Information Forum (SBIF) review, which made recommendations for improvement to biological recording infrastructure in Scotland, we are investing in a longer term solution initially through funding the Better Biodiversity Data (BBD) project that is being delivered by the National Biodiversity Network (NBN) Trust. The BBD project supports the collection, management and use of biological data to support decision-making and drive action to reverse biodiversity declines and help deliver the outcomes of the SBS. This commenced in 2022 and concludes in April 2026. The total cost is likely to be around £0.75 million and will result in the launch of a new system to manage biological data. We will then consider next steps and the need for future funding after 2026.

We also support the NBN Atlas, a UK wide platform that collects, stores, and makes available biodiversity data, serving as a central resource. We encourage partners to upload records to the NBN and there is a workflow in development that will allow marine species records to be harvested from Marine Recorder Online by the MEDIN accredited Data Archive Centre DASSH and then transferred into NBN Atlas.

In addition, the Scottish Land LiDAR Programme will provide data that can be used to create valuable information about biodiversity. The data can be used to assess habitat quality or condition based on structure, monitor change and map the distribution of certain species. The Scottish Government also support the use of Sentinel Satellite data which can be used to map habitat distribution and extent.
As the monitoring of biodiversity is an ongoing programme of work and the activities outlined here were already in progress at the time the Bill was introduced it not possible to disaggregate the costs of collecting data specifically in relation to the provisions in the Bill because much of this data is already being collated for existing purposes

We recognise the importance of robust data to support the development and monitoring of statutory targets. Part of the process we are currently undertaking is to identify appropriate indicators to use for the targets. This work is looking at what existing data is available, the scale at which it is collected and how scientifically robust it is. If we identify any further financial costs associated with this work it will be set out in the policy memorandum accompanying the secondary legislation.

Timing for first targets

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

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

While I understand the concerns expressed by stakeholders, as the Committee will be aware, it is standard practice that provisions in Bills are commenced by regulations made under the Act.

This allows for any practical measures necessary for the implementation of the Act to be put in place in good time, and in advance of the provisions coming into effect. It also ensures that anyone who may be affected by the Act has a reasonable opportunity to acquaint themselves with the final version of the Act and prepare for the provisions coming into force.

However, I can confirm that should the Bill be passed, the policy intention is to commence the provisions in the Bill as soon as practically possible, after Royal Assent has been granted.

As set out in the Bill, Scottish Ministers must then lay draft regulations before the Scottish Parliament within 12 months of section 1 coming into force.

Monitoring

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

6. *Can the Scottish Government provide more information on the "wider monitoring framework" this refers to, including:*
a) When there will be a further State of Nature report for Scotland?

We recognise the importance of the State of Nature Report as a key source of information on the state of Scotland's biodiversity. It is an example of excellent collaboration between NatureScot and a wide range of research and conservation organisations, which we are keen to support going forward. The most recent State of Nature report was published in 2023. While as yet there are currently no confirmed dates for the next report, they have previously been published around every three years.

b) When the Scottish Government intends to publish the Scottish Environment Strategy as required by the Continuity Act?

I am planning to hold a public consultation this summer on a draft Environment Strategy, building on the Vision and Outcomes document published in 2020, that will fulfil this obligation. I intend to prepare and publish a final strategy after considering issues raised in response to the consultation."

c) How statutory biodiversity targets will relate to (or be informed by) the biodiversity metric NatureScot is developing on behalf of the Scottish Government? Is there an agreed timeframe for this metric to be finalised and what are the current plans for how this biodiversity metric will be used e.g. in the planning system or more widely?

The Scottish Government has commissioned NatureScot to develop an adapted biodiversity metric specifically to support delivery of National Planning Framework 4 policy 3b. NatureScot are working at pace to produce a robust and thorough tool but they acknowledge

that this is very complex work and that it will take time to get this right. The final outputs of NatureScot's work will include a biodiversity metric tool and supporting guidance. We anticipate the publication of interim guidance on existing metrics by NatureScot by summer 2025. Updates and contact details are available on the NatureScot website.

However, this work relates to the measurement of biodiversity at a site level, whereas statutory nature targets will be looking at the state of biodiversity across Scotland and using national level indicators. We recognise the importance of ensuring there is coherence and consistency in the approach we take to measuring biodiversity at both site and national levels but in general the two are not directly comparable.

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

Target setting criteria for selecting targets were developed in Step 1 (policy framework) of the process to select targets. This step involved setting out the considerations and divisions regarding the purpose and form of targets, i.e. the type, number and timescale, and the criteria for selection.

These were set out in the 2023 consultation and have been used throughout the development of targets. The criteria to be taken into account in the selection of targets are:

- Alignment with the Scottish Biodiversity Strategy high-level goals and outcomes.
- Alignment with the Global Biodiversity Framework (GBF) targets, metrics and indicators.
- Alignment with EU's environmental standards including with the Nature Restoration Law.
- Synergy with existing and forthcoming Scottish Government legislative frameworks and strategies, e.g. the emissions reduction targets; Climate Change Plan, and Scottish Climate Change Adaptation Programme (SCCAP).
- Targets that will galvanise cross sectoral and cross portfolio action.
- Targets that are SMART (Specific. Measurable. Achievable. Realistic. Timebound) in line with CBD guidance.

We will continue to use this set of criteria which will be fundamental to the development of the detail of targets to be set in the secondary legislation. We will also consider suggestions of whether references to the Global Biodiversity Framework or the ambition within the Scottish Biodiversity Strategy to halt biodiversity loss and be nature positive by 2030 and to have restored and regenerated biodiversity by 2045 should be included within the Bill.

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

8. Did the Scottish Government consider using this Bill to strengthen these duties, or to support increased accountability in relation to the reporting duty? What are the current

arrangements for ensuring compliance with this duty, and for NatureScot to collate and publish reports?

The Nature Conservation (Scotland) Act 2004 ("the 2004 Act") places a statutory duty on all public sector bodies in Scotland to further the conservation of biodiversity. The Wildlife and Natural Environment (Scotland) Act 2011 inserted section 2A into the 2004 Act which introduced a requirement for all public bodies to make a report publicly available on their compliance with the biodiversity duty. Biodiversity duty reports are required every three years.

We are aware that the data included in reports from public bodies is not used as effectively as it could be. We do not however think that legislative changes are the best approach. We intend to review the reporting process to make reports more effective and meaningful, and to ensure these contribute to the outcomes of the SBS. We are also keen to streamline the reporting process to reduce the reporting burden placed upon public bodies, in particular Local Authorities. Action 31.3 in the SBS Delivery Plan contains an undertaking to carry out a review of the Duty Reporting process and that is under active consideration.

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

Input from nature agencies in formulation of power

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

There were ongoing discussions with NatureScot throughout the development of the Bill. NatureScot responded to the Scottish Government consultation 'Enabling powers for Scotland's Environmental Impact Assessment Regimes & Habitats Regulations', stating that they agreed with the rationale for taking the power in Part 2 and noting that:' *Being able to amend the Regulations will help address the nature and climate crises by making the legislation for the National Site Network in Scotland fit for purpose in the 21st century. This will include enabling changes that might be required to deliver 30x30 through making the protected areas network as effective as possible. It will also allow us to continue to implement administrative improvements as and when they are identified, thereby improving public sector efficiencies.'*

No advice was sought from JNCC and they did not respond to the consultation.

Lack of parent act for the Habitats Regulations and EIA regime

Stakeholders have said that the Habitats Regulations and EIA regimes, despite being set out in secondary rather than primary legislation, are core to environmental protection and biodiversity conservation in Scotland. It is also noted that the reasons they are set out in secondary legislation is due to historical choices, partly driven by technical considerations, made at the time the underlying EU law was implemented. Other measures of similar significance and EU origin were incorporated into primary legislation, e.g. on Strategic Environmental Assessment and parts of the Wildlife and Countryside Act 1981.

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

The Habitats Regulations and most of the EIA legislation is contained in secondary legislation (transport related EIA legislation is an exception as it was transposed into primary legislation). Decisions on the appropriate legislative vehicle to use to implement EU obligations would have been made by ministers, with advice from officials, at the time of implementation. At the point of EU exit there were thousands of items of assimilated law (previously known as retained EU law) on the statute book and the provisions of the European Union (Withdrawal) Act 2018 ensured that this legislation would continue to apply in the UK, in the form it took at the point of exit. The Scottish Government considered that it was a more effective use of limited Parliamentary time, and a more appropriate future proofing mechanism, to pursue this modification power and to retain the existing legislative framework.

The scope of existing powers to adapt sites and site features

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

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

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

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

The Committee notes that the equivalent 2019 EU exit amendment Regulations in England (The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019) inserted Regulation 16A to the Habitats Regulations applying in England, Wales and in offshore waters, and that Regulation 16A uses the same (or very similar) wording as

Regulation 9D. Defra has published guidance on the amendments to the extent they cover England and Wales and their inshore waters.
Regarding the Regulation 16A duty the guidance states:

"The appropriate authorities must adapt the network where necessary given that the abundance and distribution of habitats and species within the network might evolve over time. They may need to designate new SACs or SPAs to achieve the network objectives. They may also need to amend
existing SACs or SPAs. For example:

> *• if their protected features have changed over time, including re-introduced species or a new or increasing population of birds on an existing site has reached internationally important numbers*
> ***• if the site boundary needs to be moved in response to storm events or natural processes***
> *• to include an area which compensates for the loss of other areas within the network as a result of a plan or project proceeding for IROPI reasons"*
> *(emphasis added)*

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

"In exceptional circumstances, the appropriate authority can declassify all or part of a SAC or SPA in order to adapt the national site network in response to natural developments. The process for de-classification is the same as the process for designating a site.

The appropriate authority will assess if:
- *the site continues to meet the criteria for designation*
- *the site's contribution to the achievement of the conservation of natural habitats and species has been irretrievably lost*

De-classification may be appropriate where, for example, conservation measures based on best scientific and technical knowledge have been implemented but have not been successful. De-classification cannot be based on a failure to comply with the obligations set out in the 2017 Regulations, as provided in case law such as the Tre Pini case
.
De-classification is unlikely to result from a failure to adopt appropriate conservation measures to conserve, restore or avoid deterioration of the site, or a disturbance of the species for which the site is designated. If the appropriate authority decides to declassify a site or part of a site, it must make sure the:
- *coherence of the national site network is maintained*
- *network objectives are achieved in other ways, such as designating new SACs or SPAs"*

11. In what ways does the Scottish Government consider the site network in Scotland can be adapted under the existing regime, to fulfil the duty on Scottish Ministers to "manage, and where necessary adapt, the UK site network", as set out in Regulation 9D of the Habitats Regulations? How did the Scottish Government consider Regulation 9D in arriving at its view that "there is no mechanism to adapt European sites designated under the 1994 Habitat Regulations, other than to designate additional sites or to add additional protected species or habitats ("features") to a site citation"?

It is the Scottish Government's view that the provisions in Regulation 9D relate to clarifying that the UK site network has the same overarching objectives as the European Union's Natura 2000 network and the role of Scottish Ministers in achieving these objectives. The focus of Regulation 9D is setting site network management objectives that relate to the achievement of Favourable Conservation Status of the habitats and species recognised as of special concern in the Annexes of the Habitats and Birds Directives.

The Scottish Government does not consider that the duty conferred through Regulation 9D will allow the boundaries of individual European sites to modified, features removed from citations or sites to be de-designated, noting that there are no processes specified to achieve this in either Regulation 9D nor in the Habitats Regulations more widely.

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

The Scottish Government has not provided any directions or guidance to NatureScot in relation to its interpretation of the changes made by the Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019, in particular the introduction of regulation 9D into the 1994 Habitats Regulations. We are not aware of NatureScot having produced any (external or internal) guidance on how regulation 9D should be interpreted.

The purpose of regulation 9D is to impose a duty on Scottish Ministers (in cooperation with other UK authorities) to contribute to the achievement of the management objectives of the UK site network by managing, and where necessary adapting, the UK site network.

The pan-UK Habitats Regulations and International Sites Management Group (HaRIS Management Group), which is chaired by DEFRA with representatives from devolved administrations and Statutory Nature Conservation Bodies is currently considering the practical implications of managing and adapting the UK site network collectively and for individual administrations.

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

The Defra policy paper, published on 1 January 2021, sets out an explanation of the changes made to the Conservation of Habitats and Species Regulations 2017 by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019, including examples of how the site network could be adapted using the provisions in regulation 16A.

The Scottish Government takes a different view to that set out in the policy paper. It is not clear if this policy paper remains UK Government policy or if any guidance has been issued on how this approach would operate in practice.

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

The current legislative framework governing protected areas is extensive and complex, being spread across several pieces of primary and secondary legislation. Although the proposed provisions which were put forward at consultation would address some of the immediate known issues around inflexibility and the wider constraints on protected areas making a full contribution to tackling the biodiversity crisis, they would not address some of the deeper rooted concerns over the legislative framework and could have unintended consequences by bolting on additional measures to the existing framework, creating additional complexity.

The Scottish Government therefore took the decision not to progress protected areas reform as part of the Natural Environment Bill, but to look to a future Parliament, depending on their priorities, to undertake a more fundamental review and reform of the legislative framework covering nature conservation, including protected areas.

The Scottish Government is also aware that the Eleventh Programme of Law Reform set out by the Scottish Law Commission includes 'consolidation of nature conservation legislation', which would include the legislation relating to protected areas.

Scrutiny

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

15. Please can you respond to these points.

Section 2(6) sets out a list of provision that can only be made in regulations subject to the affirmative procedure. The drafting intention in section 2(7) is that any other regulations made using the power in section 2(1) can be laid using either the affirmative or the negative procedure. The Scottish Ministers would make this decision based on the content of the regulations with any regulations which make substantial changes to the legislation requiring greater levels of scrutiny and therefore also subject to the affirmative procedure (as set out in para 72 of the Delegated Powers Memorandum). The drafting approach taken in section 2(7) is in line with how an either way approach has been drafted in previous legislation, For example, see section 5(3) of the UK Withdrawal from the European Community (Continuity)

(Scotland) Act 2021 and section 2(3) of the Agriculture (Retained EU Law and Data) (Scotland) Act 2020.

My intention, in taking this approach, is to ensure that any use of the power is subject to an appropriate level of scrutiny. I anticipate that some uses of the power in Part 2 may be relatively minor or more technical in nature (such as moving from paper to electronic copies of EIA reports) and in such circumstances, it may not be proportionate, nor an efficient use of parliamentary time, to use the affirmative procedure. Allowing for a choice of procedure represents a sensible, pragmatic and efficient approach.

Before exercising any use of this power, there is a requirement for ministers to consult with persons who may have an interest in, or be affected by, the regulations. This ensures that all stakeholders have the opportunity to provide feedback for officials and ministers to consider. It is my expectation that such consultation will include consideration of the most appropriate Parliamentary procedure.

If a lead committee had any concerns with regard to the parliamentary procedure chosen by the Scottish Government, in its exercise of the power in section 2(1), it has the option to write to the Scottish Government with further questions and or/invite officials or the Minister to give evidence on the instrument.

Environmental safeguards

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

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

The policy intention is that the power will be used to enhance our ability to respond to the nature and climate crises. The list of purposes in section 3 set out the very specific circumstances in which the power can be used. We believe that these purposes, together with the requirement to consult and further scrutiny through the parliamentary procedure, provide the correct balance of flexibility and checks and balances to ensure that the policy intention is met.

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

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

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

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

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

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

The UK Government legislated through the Energy Act 2023 to take powers to modify the Habitats Regulations, as they apply to offshore wind activity. Work is currently ongoing across the UK and Scottish governments to bring forward secondary legislation using the powers in the Energy Act 2023 to modify the Habitats Regulations. It is for the Scottish Government to bring forward secondary legislation for any proposed changes to the Habitats Regulations as they apply in inshore waters, and for the UK Government to do so as the regulations apply in offshore waters. Relevant consultations will be launched in due course.

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

If the Bill is passed, the Scottish Government would have the option to introduce legislation using the power in the Bill instead of the power in section 293 of the Energy Act, however, on a practical level this would not be feasible. Offshore wind activity in Scottish waters takes place in both the offshore and inshore region and it is crucial that there is a consistent regulatory framework that applies across both offshore and inshore waters. The UK Government will be legislating, using powers in section 293, for the offshore region and it is intended that the Scottish Government will legislate in the inshore region using section 293. Both governments have been working together on the proposed reforms.

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

Planning permission under the Town and Country Planning (Scotland) Act 1997 is frequently required for a range of onshore transmission infrastructure related to offshore renewable energy projects. This includes infrastructure like cable landfalls, onshore substations and underground cable routes. These applications are subject to the requirements of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 and the 1994 Habitats Regulations.

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

Electricity generation from wave and tidal power is currently at a very early stage of development in Scotland, however, if we are seeking to expand this capacity in future then the correct legislative framework will need to be in place to support these developments. Part of the rationale for these powers is therefore enabling the legislative framework to be updated when required, including in response to changes in technology.

For the avoidance of doubt, the powers in the UK Energy Act referred to in question 18 above only apply to offshore wind activity and cannot be used in relation to other renewable energy generation activities, like wave and tidal power.

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

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

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

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

21. In the Scottish Government's view, could the section 3(c) purpose to ensure consistency or compatibility with other regimes legally be used to make substantive changes to Scottish EIA legislation and the Habitats Regulations? What is your response to the concern

expressed by stakeholders that this purpose "could potentially be interpreted as allowing for a standardisation with
English or UK legislation, regardless of whether that means weakening our approach to nature conservation"?

The reason for inclusion of the purpose at 3(c) was to provide the Scottish Government with the ability to ensure that these regimes remain coherent with any future legislative changes, including those made by UK Government, or to implement international obligations.

The rationale for including this purpose was particularly focused on the marine environment, where the UK Government has legislative competence for the Scottish offshore region and the Scottish Ministers have legislative competence for the Scottish inshore region. It may be necessary for the Scottish Government to adapt legislation within devolved competence to ensure inter-operability with any future changes made by the UK Government, for example, to introduce an EOR regime in the offshore region. This is crucial given that certain marine activities, in particular, offshore renewable energy generation take place across both the offshore and inshore regions.

The government has no policy intention to standardise more widely with English or UK legislation in a way that would weaken our approach to nature conservation.

However, I recognise the concerns that have been raised by stakeholders that the power, as currently drafted, could potentially be used in the future in a way that was contrary to our stated policy intention and I will give this further consideration ahead of Stage 2.

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

The LURA contains powers that would enable the Scottish Government to introduce an EOR regime in Scotland if it wanted to do so. That is not current Scottish Government policy. As part of any EOR regulations made, the power in section 164 of the LURA can be used to amend Scottish EIA legislation and the 1994 Habitats Regulations to address any interactions with the new EOR regime.

As set out in paragraph 157 of the policy memorandum the power in section 164 of the LURA can only be exercised when making EOR regulations. The power in part 2 of the Bill, in particular relying on purpose 3(c), could be used by the Scottish Government to address any inter-operability issue without having to make EOR regulations themselves. The power in part 2 of the Bill would not be used to introduce an EOR regime in Scotland given that there are extensive powers to do so in the LURA.

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

I am aware that there are powers in the LURA and proposed powers in the Planning and Infrastructure Bill which is currently being considered by the UK Parliament, which could be used by the UK Government to make changes to the EIA and Habitats Regulations, and that this could result in changes between the Scottish and UK regimes.

However, unless and until such powers are used it is not possible for me to speculate on any tensions or conflicts which could arise as a result.

In terms of EU alignment, as the First Minister reiterated during First Minister's questions on 29 May 2025 *"The Scottish Government is committed to remaining aligned with the EU where it is possible and meaningful for Scotland to do so…Many of our environmental regulations were derived from EU law, and that is an important area for consideration of alignment."*

I hope you will find this response to be helpful and I look forward to answering any further questions which the Committee may have, when I attend the Committee to give evidence on 4 June 2025.

I am copying this letter to the Cabinet Secretary for Rural Affairs, Land Reform and Islands, the Minister for Agriculture and Connectivity, and the Minister for Parliamentary Business.

GILLIAN MARTIN