ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE

AGENDA

3rd Meeting, 2018 (Session 5)

Tuesday 23 January 2018

The Committee will meet at 9.30 am in the Robert Burns Room (CR1).

1. **Decision on taking business in private:** The Committee will decide whether to take items 4 and 5 in private.

2. **Environmental implications for Scotland of the UK leaving the EU:** The Committee will take evidence from—

   Professor Colin Reid, Professor of Environmental Law, University of Dundee;

   Professor Gavin Little, Professor of Environmental and Public Law, and Dr Annalisa Savaresi, Lecturer in Environmental Law, University of Stirling;

   and then from—

   Jonathan Hall, Director of Policy & Member Services, National Farmers Union Scotland;

   Isobel Mercer, Policy Officer, Planning and Development, Royal Society for the Protection of Birds;

   Andrew Midgley, Projects and Research Manager, Scottish Land & Estates;

   Robin Parker, Public Affairs Manager, WWF Scotland;

   Daphne Vlastari, Advocacy Manager, Scottish Environment LINK.

3. **Subordinate legislation:** The Committee will consider the following negative instrument—

4. **Environmental implications for Scotland of the UK leaving the EU:** The Committee will consider evidence heard earlier in the meeting.

5. **Inquiry into the environmental impacts of salmon farming:** The Committee will consider its approach to the inquiry.

Lynn Tullis
Clerk to the Environment, Climate Change and Land Reform Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 0131 348 5240
Email: ecclr.committee@parliament.scot.
The papers for this meeting are as follows—

**Agenda Item 2**

Environmental implications for Scotland of the UK leaving the EU  
PRIVATE PAPER

**Agenda Item 3**

Subordinate legislation cover note

**Agenda Item 5**

PRIVATE PAPER
Environment, Climate Change and Land Reform Committee

3rd Meeting, 2018 (Session 5)

Tuesday 23 January 2018

Environmental implications for Scotland of the UK leaving the EU

Background

At its meeting on 14 March 2017 the Committee heard from a panel of environmental experts on the UK decision to leave the EU and its possible impact on Scotland. The Committee subsequently met with officials from the European Commission, third country representatives in Brussels and with committees in the Welsh Assembly, House of Commons and House of Lords.

Purpose of Session

The Committee agreed that it would like to hear from environmental lawyers/experts on the UK decision to leave the EU and the development and implementation of common/shared frameworks associated with Brexit. The session will explore:

- The nature, scale and number of potential shared frameworks that may relate to work within the remit of the ECCLR Committee and likely issues that these could cover;
- the principles that should be used to guide the development of such frameworks;
- the form could such frameworks take; and
- potential shared governance arrangements for such frameworks.

The panel invited to give evidence to the Committee is:

- **Professor Gavin Little**, Professor in Environmental and Public Law, University of Stirling
- **Professor Colin Reid**, Professor of Environmental Law, University of Dundee
- **Dr Annalisa Savaresi**, Lecturer in Environmental Law, University of Stirling
- **Jonathan Hall**, Director of Policy and Member Services, National Farmers Union Scotland
- **Isobel Mercer**, Policy Officer, Planning and Development, Royal Society for the Protection of Birds
- **Andrew Midgely**, Projects and Research Manager, Scottish Land and Estates
- **Robin Parker**, Public Affairs Manager, WWF Scotland
- **Daphne Vlastari**, Advocacy Manager, Scottish Environment LINK

Submissions received by the contributors are included in the links below:

- [Professor Gavin Little](#)
- [Professor Colin Reid](#)
- [Dr Annalisa Savaresi](#)
- [National Farmers Union Scotland](#)
• Royal Society for the Protection of Birds
• Scottish Environment LINK

Background Briefing

To inform the Parliament, the Scottish Parliament Information Centre (SPICe) has prepared briefings on the implications of leaving the EU for:

• Environment
• Climate Change

While not under the remit of the ECCLR Committee, SPICe has also prepared a number of other briefings in relation to leaving the EU for:

• Agriculture
• Forestry
• Energy policy

SPICe also produce a weekly update on the UK’s exit from the EU

SPICe has produced a useful timeline of the UK’s withdrawal from the European Union

Finally, SPICe has created an information hub which provides external materials covering the UK’s decision to leave the European Union

Clerks
Environment, Climate Change and Land Reform Committee
SSI cover note for: Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451)

SSI 2017/451

Type of Instrument: Negative

Laid Date: 15 December 2017

Circulated to Members: 21 December 2017

Meeting Date: 23 January 2018

Minister to attend meeting: No

Motion for annulment lodged: No

Drawn to the Parliament’s attention by the Delegated Powers and Law Reform Committee?: Yes

Reporting deadline: 5 February 2018

Recommendation

1. The Committee is invited to consider any issues which it wishes to raise on this instrument.

Procedure for Negative Instruments

2. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament.

3. If that is also agreed to, Scottish Ministers must revoke the instrument. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or
a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.

Background and purpose
4. European Union directives are binding on Members States as to the result to be achieved, but leave them to decide on the method of achieving that result. Directives are transposed into domestic law. Further details on the EU Legislative Process can be found in the Scottish Parliament Information Centre Briefing of May 2016.

5. In May 2017, the Committee considered the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/101).

6. It was part of a suite of instruments to implement the European Directive 2014/52/EU ("the 2014 Directive") which amends Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (also known as the Environmental Impact Assessment or ‘EIA’ Directive).

7. In broad terms, the 2014 Directive requires an assessment of the environmental effects of any project which is likely to have significant effects on the environment. Any such project cannot go ahead without the consent of a competent authority, and the authority must take the assessment into account before deciding whether to give such consent.

8. The original regulations require that an environmental impact assessment is carried out in respect to any variation to consent required under s36 of the Electricity Act 1989. This is beyond the scope of what is required under Directive 2011/92/EU. The purpose of these amending regulations is to alter the requirement for impact assessments to applications where the changes proposed by the variation may cause “significant adverse environmental effects” and to align the requirements with those in the Directives.

9. A copy of the Scottish Government’s Explanatory and Policy Notes are included in Annexe A.

10. An extract from the report of the Delegated Powers and Law Reform Committee is included at Annexe B.

11. Paul Wheelhouse, Minister for Business, Innovation and Energy, wrote to the Committee on the instrument and this is provided at Annexe C.

12. The Scottish Government wrote to the Presiding Officer to explain the breach of the 28 day rule. This is included at Annexe D.

Delegated Powers and Law Reform Committee
13. At its meeting on 16 January 2018, the Committee agreed to draw the attention of Parliament to the instrument and to report that it found the breach of s28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 acceptable with regard to the instrument. The extract from the report can be found in Annexe B.

A variation application is an application to vary an existing consent granted under section 36 of the Electricity Act 1989 to construct and operate a generating station.

Regulation 28 of the 2017 Regulations applies the 2017 Regulations to variation applications as the 2017 Regulations apply to section 36 consents, subject to certain modifications. The 2017 Regulations require an environmental impact assessment to be carried out for applications for EIA development. The changes made by regulation 2(2) to regulation 2(1) of the 2017 Regulations make it clear that a variation application relates to EIA development if the proposed variation is likely to have significant effects on the environment. A definition of “proposed variation” is included.

Regulation 2(3) amends regulation 28 of the 2017 Regulations. New paragraph (1) makes it clear that, as for other EIA applications, Ministers may not grant a variation application (or make a related direction under section 57 of the Town and Country Planning (Scotland) Act 1997 unless an environmental impact assessment has been carried out. New paragraph (1A) operates to apply the 2017 Regulations subject to the modifications set out in regulation 28(2) (as read with regulation 28(3)) as amended by regulation 2(3)(b) and (c).

Regulation 2(5) and (6)(a) to (f) rearrange the structure of schedules 1 and 2 in consequence of changes to regulation 28.

Regulation 2(4) and (6)(g) update references following the replacement of the Conservation of Habitats and Species Regulations 2010 by the Conservation of Habitats and Species Regulations 2017.

Scottish Government Policy Note

The above instrument was made in exercise of the powers conferred by Section 2(2) of the European Communities Act 1972. The instrument is subject to negative procedure. Section 2(2) of the 1972 Act is the enabling power for the provisions in these Regulations relating to variation applications under the Electricity Act 1989.
Policy Objectives

Introduction
The purpose of these regulations is to update The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (as amended in 2017) (“the 2017 Regulations”) in order to clarify the 2017 Regulations as far as they apply to variation applications under the Electricity Act 1989.

Directive 2011/92/EU (the “EIA Directive”) aims to ensure the authority giving the primary consent for a particular project makes its decision in full knowledge of any likely significant effects on the environment. The 2017 Regulations currently go beyond the requirements of the EIA Directive and require that an EIA is carried out in respect of any variation to section 36 consent, even if the variation will have no additional environmental effects, or where the variation may make the development more efficient or environmentally beneficial. This places unnecessary regulatory burden on Scottish Ministers, consultation bodies and developers. The amendment will ensure that the scope of the EIA process is the same in both the 2017 Regulations and the EIA Directive. As a result of the amendment, only variation applications where the changes proposed by the variation may cause significant adverse environmental effects will require an EIA is carried out.

Therefore it is necessary to make this amending instrument and bring it into force early, to unify the scope of the EIA process within the 2017 Regulations and the EIA Directive as soon as possible, reduce regulatory burden, avoid additional delays to offshore wind development and thus allow Scottish Government to achieve its policy of reducing carbon emissions and promoting economic growth.

Key changes
The following is a summary of the main changes made to the 2017 Regulations.

Environmental Impact Assessment Process
Changes to Regulations 2 and 28 within the 2017 Regulations will ensure variation applications under the Electricity Act 1989, which do not pose a likely significant adverse impact on the environment, can be processed outwith the EIA process as they do not constitute projects which may require EIA process under Annex II of the EIA Directive.

Changes to Regulation 36(2) to update the reference to the Conservation of Habitats and Species Regulations 2010 which have been revoked and replaced by the Conservation of Habitats and Species Regulations 2017.

Consultation
The Scottish Government did not consult on proposals for amending the 2017 Regulations as the changes being brought forward are considered minimal and are being made to simply align the 2017 Regulations with the purpose of the EIA Directive. These Amendments improve consistency between the 2017 Regulations and the Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 and will prevent significant consequences for development of national
significance. There will be no negative or environmental consequences as a result of the Amendments.
Scottish Government
Directorate of Marine Scotland
14 December 2017

Annexe B

EXTRACT FROM THE DELEGATED POWERS AND LAW REFORM COMMITTEE’S 1st REPORT OF 2018

Recommendation
Accordingly, the Committee draws the Regulations to the attention of the Parliament on reporting ground (j) as they fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

The Regulations were laid before the Parliament on 15 December 2017 and came into force on 18 December 2017. This does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.

The Committee finds the failure to comply with section 28(2) to be acceptable in the circumstances as outlined in correspondence from the Scottish Government to the Presiding Officer on 15 December 2017, supplemented by the written response to the Committee on the Regulations.

Annexe C

Dear Graeme,

The Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017

The above amending instrument was made on 14 December 2017 by the Scottish Ministers under sections 2(2) of the European Communities Act 1972, and section 36C(2) of the Electricity Act 1989. It is being laid before the Scottish Parliament today, and comes into force on 18 December 2017. I attach a copy of the instrument for your information.

This instrument is required to amend the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations (SSI 2017/101). SSI 2017/101 was laid before Parliament on 31 March 2017 and came into force on 16 May 2017. The amendment clarifies the procedure for dealing with applications to vary consents under section 36 of the Electricity Act 1989, and updates references to “the Conservation of Habitats and Species Regulations 2010” which have been revoked.

Without these amendments, SSI 2017/101 as drafted requires variations to section 36 consents under the Electricity Act 1989 to go through a full EIA assessment process even where there are no additional adverse environmental effects from the variation, therefore going well beyond the requirements of Directive 2011/92/EU (the
“EIA Directive”). This process places a significant regulatory burden on both the Scottish Government as the competent authority and consultation bodies. The amendment brings SSI 2017/101 into line with the EIA Directive.

SSI 2017/101 requires an EIA to be carried out for applications for “EIA development” (as defined in Regulation 2(1) of SSI 2017/101). Regulation 2(2) of the amending instrument updates the definition of EIA development to make it clear that a variation application relates to EIA development only if the proposed variation is likely to have significant effects on the environment. This adopts the approach taken within the EIA Directive, and it means that changes to developments which do not have significant effects on the environment are no longer brought within the EIA process.

The other amendments within the instrument update associated provisions within SSI 2017/101 to ensure that this updated approach is reflected throughout the entire instrument (particularly in Regulation 28 and Schedules 1 and 2 which needed to be amended to effect this updated approach).

In addition, Regulation 2(4) and (6)(g) update references in SSI 2017/101 following the replacement of the Conservation of Habitats and Species Regulations 2010 by the Conservation of Habitats and Species Regulations 2017”.

I want to make clear that I regret the necessity to breach the 28 day rule, which ordinarily gives time for the Committee to consider the instrument. I acknowledge this is far from ideal, and the decision has not been taken lightly, but I consider it necessary to bring the instrument into force as soon as possible to unify the scope of the EIA process within the 2017 Regulations and the EIA Directive and have sought reassurance that this will not result in significant impacts on the environment. This change will reduce regulatory burden, and avoid potential additional delays to development of offshore wind development, and through doing so, it will allow the Scottish Government to support the unanimously approved greenhouse gas emission targets approved by the Scottish Parliament, as well as to deliver sustainable economic growth.

I would be pleased to meet with the Committee, at the earliest mutually convenient opportunity, to explain the rationale behind the necessity to breach the 28 day rule in these exceptional circumstances.

PAUL WHEELHOUSE

Dear Presiding Officer,

The Electricity Works (Environmental Impact Assessment) (Scotland) Amendment Regulations 2017 (SSI 2017/451)

The above amending instrument was made on 14th December 2017 by the Scottish Ministers under sections 2(2) of the European Communities Act 1972, and section 36C(2) of the Electricity Act 1989. It is being laid before the Scottish Parliament today, and comes into force on 18 December 2017.
Section 28(2) (the 28 day rule) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) of that Act, this letter explains the reasons for this.

This instrument is required to amend the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations (SSI 2017/101). SSI 2017/101 was laid before Parliament on 31 March 2017 and came into force on 16 May 2017. The amendment clarifies the procedure for considering variation applications under section 36 of the Electricity Act 1989, and updates references to “the Conservation of Habitats and Species Regulations 2010” which have been revoked.

Without these amendments, SSI 2017/101 as drafted requires variations to section 36 consents under the Electricity Act 1989 to go through the EIA process even where there are no adverse environmental effects from the variation or where in fact there may be environmental benefits, therefore going well beyond the requirements of Directive 2011/92/EU (the “EIA Directive”). This process places a significant regulatory burden on both the Scottish Government as the competent authority and consultation bodies. The amendment will ensure that the scope of the EIA process is the same in both SSI 2017/101 and the EIA Directive.

The development of offshore wind farms in Scotland strongly supports Scottish Government policy aims of reducing carbon emissions and encouraging economic growth, however the industry also faces significant challenges relating to funding and judicial review.

Four large scale offshore wind farm projects which received consent in October 2014 have faced serious delays due to judicial review proceedings brought by the RSPB. Court proceedings have only just ended and it is critical that these projects are not delayed further due to unnecessary regulatory burden. These projects may come forward with applications for variations due to technological advances since significant time has passed from when these projects were consented.

In addition, once CfD has been secured, strict milestones must be met in order to be compliant with the terms of the award. Advances in technologies during this time means that by the time developers have secured their funding they are required to vary consents in order to include these advances in technology. Variations may then be required urgently to meet CfD milestones. Technological advances may often result in reduced environmental effects.

In addition, within SSI 2017/101 there is an incorrect reference to the Conservation of Habitats and Species Regulations 2010 which have been revoked and replaced by the Conservation of Habitats and Species Regulations 2017. This Instrument corrects that reference.

We regret this breach of the 28 day rule, but we consider that it is necessary to make this amending instrument and bring it into force early, to unify the scope of the EIA process within the 2017 Regulations and the EIA Directive as soon as possible, reduce regulatory burden, avoid additional delays to offshore wind development and
thus allow Scottish Government to achieve its policy of reducing carbon emissions and promoting economic growth. We will engage with the Environment, Climate Change and Land Reform Committee both constructively and positively and at the earliest opportunity to explain the rationale behind this exceptional breach of the 28 day rule.

Mark Christie
Marine Planning and Policy
Marine Scotland