RURAL AFFAIRS AND ENVIRONMENT COMMITTEE

Wednesday 27 May 2009

Session 3

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RURAL AFFAIRS AND ENVIRONMENT COMMITTEE
15th Meeting 2009, Session 3

CONVENER

*Maureen Watt (North East Scotland) (SNP)

DEPUTY CONVENER

*John Scott (Ayr) (Con)

COMMITTEE MEMBERS

Karen Gillon (Clydesdale) (Lab)
*Liam McArthur (Orkney) (LD)
*Alasdair Morgan (South of Scotland) (SNP)
*Elaine Murray (Dumfries) (Lab)
*Peter Peacock (Highlands and Islands) (Lab)
*Bill Wilson (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Rhoda Grant (Highlands and Islands) (Lab)
Jamie Hepburn (Central Scotland) (SNP)
Jim Hume (South of Scotland) (LD)
Nanette Milne (North East Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

Phil Alcock (Marine Scotland)
Chris Bierley (Marine Scotland)
Allan Bowie (NFU Scotland)
Stuart Foubister (Scottish Government Legal Directorate)
Jonny Hughes (Scottish Environment LINK)
Richard Lochhead (Cabinet Secretary for Rural Affairs and Environment)
David Palmer (Marine Scotland)
Philip Robertson (Historic Scotland)
Linda Rosborough (Marine Scotland)
Ian Walker (Marine Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

SENIOR ASSISTANT CLERK

Roz Wheeler

ASSISTANT CLERK

Lori Gray

LOCATION

Committee Room 1

Scottish Parliament

Rural Affairs and Environment Committee

Wednesday 27 May 2009

[THE CONVENER *opened the meeting at 10:01*]

Subordinate Legislation

Swine Vesicular Disease (Scotland) Order 2009 (SSI 2009/173)

The Convener (Maureen Watt): Good morning, everybody. I welcome you to the committee's 15th meeting of the year. I remind everybody to turn off their mobile phones and pagers because they impact on the broadcasting system.

We have quite a heavy agenda. The main purpose of the meeting is to take evidence on the Marine (Scotland) Bill. This will be the committee's first evidence session on the bill and will involve Scottish Government officials. The committee will also consider several items of subordinate legislation and its approach to the Climate Change (Scotland) Bill at stage 2.

The first item of business is consideration of the Swine Vesicular Disease (Scotland) Order 2009 (SSI 2009/173). The Subordinate Legislation Committee has commented on the instrument and the relevant extract of its report has been circulated as paper RAE/S3/09/15/2. No member has raised any concern in advance of the meeting and no motion to annul has been lodged. Do we agree not to make any recommendation in relation to the instrument?

Members *indicated agreement*.

Environmental Liability (Scotland) Regulations 2009 (Draft)

The Convener: Item 2 is evidence on an instrument that is subject to the affirmative procedure—the draft Environmental Liability (Scotland) Regulations 2009. Our purpose is to consider stakeholders' views on the instrument in advance of the committee's formal consideration of the instrument next week. I welcome Allan Bowie, the vice-president of the NFU Scotland, and Jonny Hughes of Scottish Environment LINK. I invite questions from members.

Elaine Murray (Dumfries) (Lab): I suppose that I should kick off, as it was I who asked for evidence to be taken on the instrument. Concerns have been raised by Scottish Environment LINK about the difference between the transposing of the European Union directive in the rest of the United Kingdom and the way in which it is being transposed in Scotland. In particular, in Scotland it is not being extended to cover damage to sites of special scientific interest and Ramsar sites. Do you believe that the current legislation adequately protects such sites? If not, how is it inadequate?

Allan Bowie (NFU Scotland): I thank the committee for this chance to give evidence. We believe that the current legislation is enough and that there is enough legislation in process to protect the sites. The fear is that the regulations' being passed with the amendment will be gold plating. We have a lot of members who firmly believe that the polluter should pay—we have nothing against that—but we are concerned about the extension of the directive. That is NFU Scotland's position.

Jonny Hughes (Scottish Environment LINK): I thank the committee for the opportunity to comment. I read a paper yesterday about the EU environmental liability directive and was shocked to find that it has been 20 years in gestation. It is quite an important piece of legislation to the environment movement and we welcome the purpose of the directive, which is to make the polluter pay. However, we think that it does not go far enough if it does not apply to SSSIs, which will be regulated as a second tier of nature conservation beneath the European protected species and sites.

Our view is consistent with the Joint Nature Conservation Committee's recommendation that the trigger for liability should be damage to the site integrity of SSSIs, which is the most workable and practical damage threshold. The JNCC's memorandum to the United Kingdom Parliament's Environment, Food and Rural Affairs Committee states that,

"given that there is no assessment of conservation status for such features, apart from those listed in the EC Habitats Directive, and it would be difficult to establish such values given territorial and local variations and priorities, the site integrity test would be the most logical option to determine the threshold for biodiversity damage."

We are not just coming at this from a moral perspective, in that we think that the directive's application to SSSIs is generally good for the protection of the environment; it is as much about legal certainty and fairness to operators. There could be two different regimes operating on the same land because many SSSIs, special protection areas and special areas of conservation cover the same patch of land. We therefore think that extending the directive to cover SSSIs would be as much about legal fairness as anything.

Elaine Murray: Thanks for that. In answer to a written question in which I asked the Government why it had not included SSSIs and Ramsar sites in

the regulations, I was told that the majority of respondents to the Government's consultation were opposed to their inclusion. Do you have any comments on the consultation and the responses that were received?

Jonny Hughes: That is an interesting issue. Scottish Environment LINK submitted one response to the consultation, but we are a membership body that represents 32 organisations with 500,000 members. Had each of those organisations submitted a separate consultation response, the number of respondents in favour of extending the regulations to SSSIs would have outweighed the number of respondents that were not in favour of that. However, in order not to overwhelm the Government with submissions, we decided to submit just one response on behalf of Scottish Environment LINK.

Allan Bowie: The NFUS did the same—we made one submission. It is pertinent that more than 70 per cent of respondents believe that the status quo is okay. We firmly believe that it is the management of the sites that is important, and legislation is currently in place that will ensure that that is looked after. I do not think that we need additional legislation to ensure that the sites are managed in the correct way. That is the crucial bit.

Elaine Murray: Jonny Hughes believes that there could be confusion for operators, users and whoever because they would be operating under two different regimes. Do you perceive it as being not confusing to have two different regimes?

Allan Bowie: I think that the structures that are in place are quite clear. If they are adhered to, a clear message will be sent to people who think that they can get away with polluting, which is rightly a criminal offence. If the current legislation is implemented correctly, I see no problem and no need for the regulations to be extended.

Jonny Hughes: As we say in our written submission on the SSSI issue, the main relevant law is the Nature Conservation (Scotland) Act 2004—in particular, section 40 of that act, which deals with restoration orders. That differs from the environmental liability directive in a number of ways. As Allan Bowie has said, a conviction for a criminal offence is required under the 2004 act, and it is at the judge's discretion whether restoration should take place.

The environmental liability directive differs in several ways, as our submission outlines. The two most important aspects are that compensatory and complementary measures can be undertaken under the directive, whereas they do not apply under the 2004 act, and that the directive uses a civil regime, so a criminal conviction is not required.

In one sense, the regulations are stronger, but I return to the point that if damage were caused to an SSSI that overlapped with a special protection area or a special area of conservation, much legal uncertainty would be created about what regime should be applied. The potential could exist for double restoration and for pursuing a criminal conviction while applying environmental liability, because an SAC were involved. That would lead to more uncertainty for farmers and landowners.

In many ways, the regulations could be positive. I certainly do not think that we are talking about gold plating. The aim is better regulation in the true sense of the words. Sometimes, it is pertinent to align European legislation with existing Government priorities and policies: this is a case in point.

Elaine Murray: We know that the legislation for the rest of the UK will cover SSSIs and Ramsar sites. Do we know what is happening in the rest of Europe?

Jonny Hughes: Information from the rest of Europe shows that various approaches are being taken to transposition. Spain is one of the countries that have proactively pushed through the directive, mainly because of two big environmental catastrophes there—the 1998 mine disaster that polluted the Doñana national park, and the wreck of the ship Prestige off the coast of Galicia in 2002. The burden for the clean-up costs of those incidents fell not on the polluter, but on the Spanish taxpayer, which cost the Spanish Government an awful lot of money. Spain has exceeded the directive's requirements and has extended the law to cover damage to the biodiversity not just of protected areas and species, but of all areas and species throughout the country. That example is useful. It is obvious that Spain has suffered significant environmental damage events, for which the taxpayer has paid the bill. Having had their fingers burned, the Spanish are keen to implement a strong environmental liability regime. Does that answer your question?

Elaine Murray: Yes, thank you.

Peter Peacock (Highlands and Islands) (Lab): I understand the NFUS's position, which is that the current law is in all regards sufficient to deal with matters. I am struggling somewhat with LINK's position. Jonny Hughes got close to the issue a moment ago, but perhaps he can go further.

LINK's submission says that

"Scottish Ministers will substantially fail"

if they do not introduce the enhancement that you seek, but you do not illustrate the threats. What are the threats from which we require extra protection?

Jonny Hughes: Our comment that the

"Scottish ministers will substantially fail"

relates to the practicality of implementing the thresholds that will apply to damage to the favourable conservation status of European protected species and habitats. Until we have case law, we do not know how that will work.

I return to the JNCC's recommendation. It is extremely difficult to prove damage to favourable conservation status, particularly when it is measured across the whole natural range of that habitat or species, which could include the European Community. The liability directive is slightly ambiguous, because it also refers to local effects. The provision is open to interpretation both ways. It could be argued that, if a damage event leads to localised extinction of a species—

10:15

Peter Peacock: What might a "damage event" actually be? Could it be a tanker hitting the coast—you have used such an example from Spain—a farmer extracting aggregates from an area of ancient moraine, new tracks going up a mountainside or diggers working on the coast? Could you give me a feel for what the damage to which you are referring might be?

Jonny Hughes: A "damage event" could be all those things. Let us consider your example of a track going up a mountainside. Peatland is an example of an annex 1 habitat. If a road is put through an area of peatland—as has happened—it damages the integrity of the hydrogeomorphology of the peatland and would, ultimately, damage the biodiversity that is associated with that hydrogeomorphology. If we consider the peatland resource in the whole of Scotland, the UK and the European Community, we might conclude that the building of that one track is not significant damage: there are peatlands elsewhere, so it would not constitute a decline in favourable conservation status across the whole of the resource. If we base the issue on a site integrity test and if the peatland is an SSSI, the damage on that local scale has damaged the SSSI's site integrity, so the ELD would be triggered. That is the difference.

Peter Peacock: Why would the provisions for managing an SSSI, planning law and so on not provide for a remedy in those circumstances? Why do you have to have a further remedy?

Jonny Hughes: It is not so much about having a further remedy as it is about taking a consistent approach and applying environmental liability to protected habitats under the habitats directive. SACs and SPAs will apply to such habitats, and there is case law to show that, if one site is damaged in the network, that effectively damages the favourable conservation status of the whole network.

There will be a different regime for SSSIs—the regime under section 40 of the Nature Conservation (Scotland) Act 2004. That regime is different in a number of ways, some of which I have already outlined. It does not include complementary or compensatory measures. There needs to be a criminal conviction. I could go on, but—

Peter Peacock: In that context, who decides on damage? Who is the arbiter of—

Jonny Hughes: It would be the competent authority.

Peter Peacock: Which would be Scottish Natural Heritage or Scottish Environment Protection Agency or—

Jonny Hughes: The competent authority would be SNH in respect of damage to natural habitats.

Peter Peacock: And it would be SEPA for—

Jonny Hughes: It would be SEPA with regard to water damage on land.

John Scott (Ayr) (Con): If that damage had taken place after permission had been given by a competent authority—for example, for building a forestry road—who would be liable?

Jonny Hughes: At the moment, the Scottish Government has chosen to transpose the permit defence. As long as a permit has been granted, the permit defence could be used to argue that the necessary permissions had been granted for the road. Therefore, environmental—

John Scott: Nevertheless, the damage would have been done. Would the burden fall back on the Government to reinstate the land?

Jonny Hughes: I am not a lawyer, so I cannot comment on the potential outcomes in such situations. However, I suspect that if the permit defence were invoked the burden would indeed fall back on the taxpayer, although that might depend on the level of damage.

John Scott: So, it would be no different. If, say, a farmer or the Government incurred damage, both would have to pay, even if the permit defence had been invoked.

Peter Peacock: I would like to put the same point to Allan Bowie. What is your view on the adequacy of the existing law to deal with situations in which somebody extracts aggregates without consent and against management rules, or does some of the other things that I mentioned?

Allan Bowie: The procedures are in place already. A person who goes in without consent and does damage is liable; that is quite clear cut.

Planning permission regimes are in place. If someone falls foul of or goes outwith them, procedures exist to make them responsible. The NFUS does not think that an extension to enforce that is needed; rather, the existing regime needs to be enforced at the time. It is pertinent to ask "What if?" but I do not think that such scenarios have actually happened. The procedures that are in place should be strict enough to prevent such situations.

Jonny Hughes: Under section 40 of the 2004 act, only owners and occupiers are liable, if there is damage, to carry out restoration. Under the environmental liability directive, if a third party causes a major pollution event on the land of a landowner, that third party would be liable. It is important to point out the extension of the provision to cover third parties, which affords some protection to landowners. The landowner, or a combination of the landowner and the Government, do not have to pay the clean-up costs. The polluter must do so.

Allan Bowie: On any land, if a third party is responsible, insurance is in place to ensure that the third party is liable for the clean-up. That provision is currently in place, so I do not see the need for the legislation to cover third parties.

Jonny Hughes: Would that apply across the board for all cases of environmental damage?

Allan Bowie: Again, I am not a lawyer, but I am working in a system in which we know we are covered for that eventuality.

Alasdair Morgan (South of Scotland) (SNP): It strikes me that, in dealing with the SSI, we are dealing with practicalities as they affect people on the ground, rather than with theory. Could Mr Hughes tell me how many cases would have been affected if an instrument had been drafted as he wants the SSI before us to be, and if it had been implemented some years ago? How many examples have there been of the type of thing that you are trying to stop, which would not currently be stopped?

Jonny Hughes: I refer back to the partial regulatory impact assessment, which predicted that there would be only one additional ELD biodiversity case—I am talking only about biodiversity now. It identified that there would have been two additional cases in 2003-04, and four in 2004-05, had the ELD applied to SSSIs. That leads to a prediction of an average of three or more cases a year if SSSIs are included. That is compared with one additional case every two years otherwise.

That shows two things. First, the current regime of restoration orders under section 40 of the 2004 act appears to be inadequate. Secondly, the taxpayer could be saved money—the liability for clean-up costs would not fall on the taxpayer, but on the polluter.

Alasdair Morgan: What do you think the additional burden would be with regard to people's day-to-day activities if the regulations were put into place?

Jonny Hughes: In some ways, there would be a removal of burden. If the regime were applied consistently to SSSIs as well as to SACs, there would be consistency—and it is a civil regime. The burden of a criminal conviction would be removed or lessened. On the additional burden in terms of costs, are you thinking about insurance costs?

Alasdair Morgan: I am wondering how the regulations would affect me. If the regulations are put in place as you would wish them to be, and if I was a landowner or tenant, how would they change my day-to-day behaviour, and how much would it—

Jonny Hughes: If you did not pollute, the regulations would not change your behaviour in any way. Allan Bowie and I agree that the principle that the polluter pays is good—I think that we agree on it, anyway.

Allan Bowie: Yes.

Alasdair Morgan: Are you suggesting that nobody would do anything different if the regulations were passed as you want them to be passed? Somebody else would cough up money at the end of the day, in that case.

Jonny Hughes: The regulations are another tool in the toolbox and will make people think that they must be careful about how they operate. If people cause a pollution event, they know that they are liable to pay for it. Currently, there are many cases in which such liability might not apply.

Alasdair Morgan: To use the same metaphor, is it not some people's complaint that there are far too many tools in the toolbox, and that far too much time is spent raking around in the toolbox checking what is in it?

Allan Bowie: I fully agree. Farming systems have changed a lot over the past decade. There are gate requirements and there is other legislation in place.

To be honest, I think that farmers are more aware of environmental issues and that the number of incidences of pollution events is considerably lower than it was a decade ago. I do not have figures but I know, as a practising farmer, that we fully acknowledge our responsibility to the environment. Sustainable farming has a huge role to play in that regard, and I think that Scotland does a great job. I reiterate that I do not think that the proposed legislative extension is needed to maintain that position. We just need to tighten up. I

fully agree that we do not need any more tools in the toolbox because if we are given any more tools, we will need a bigger box.

Jonny Hughes: I come at the issue from a completely different perspective. Our purpose is not to argue for more gold plating and more regulation; it is to argue for legal certainty and fairness. We are not talking about an extension of the ELD's provisions; we are talking about dovetailing the regulations with existing legislation in order to ensure consistency. One could argue that the proposed regulations amount to better regulation that is fairer for farmers.

Allan Bowie: I am sorry, but I am not convinced.

The Convener: I remind members and witnesses that time is pressing and that John Scott, Bill Wilson and Liam McArthur still have questions to ask. I ask that questions and answers be brief.

John Scott: I want to ask two questions. As I understand it, none of the proposed provisions is to be retrospective, but what happens if in 20 years' time someone does something that turns out not to be regarded as best practice? Twenty or 25 years ago someone might have built a forestry road through a peat flow in good faith, because planting on peat flows was not regarded as bad practice back then. Are you saying that if people do something in good faith that turns out not to have the best environmental outcome, they should be held liable for that?

Jonny Hughes: There are two defences under the directive. One is the permit defence, which we have discussed, whereby a permit has been given to do something. The other is what is called a state-of-the-art defence, which relates to the current state of knowledge. Given that those two defences are available and apply to environmental liability, I do not think that that is a problem. Reckless damage is committed only if someone did not have a permit and the state of knowledge at the time was such that the action in question was known to be damaging. For example, everyone is now aware that putting a track through a peatland will damage the integrity of that site. If someone were to do that illegally, in effect, the polluter would be liable. We are all agreed that the spirit of the directive—the polluter-pays principle—would apply.

John Scott: I will let others in.

Bill Wilson (West of Scotland) (SNP): I recall that 26 years back there was highly vigorous debate about the wisdom of planting on flow country, so I do not think that it was an accepted behaviour, albeit that it was legal.

There is an issue to do with criminal conviction that I would like to clarify. If a landowner or a third party carries out a legal activity and an accident happens that results in pollution and degradation of the environment, is it the case that the person who caused the accident would not be liable to restore the environment because they were carrying out a legal activity, and that the taxpayer would have to pay for that?

Jonny Hughes: Under section 40 of the 2004 act, that is correct. I refer you to our submission on the ELD. The final paragraph of the section on environmental liability and SSSIs says that the relevant criminal offences

"mainly apply to owners and occupiers of SSSIs, or persons who are subject to land management orders or agreements … Again, this is obviously much narrower than the ELD requirements."

In effect, it would be extremely difficult to bring a criminal conviction against a third party who polluted land, because under the 2004 act, the relevant offence applies only to owners and occupiers.

Bill Wilson: I was not asking whether it would be possible to bring a criminal conviction; I was asking who would be responsible for the costs if pollution occurred and it was accepted that it was caused by a third party or by the landowner, albeit that it had been caused by accident. In such cases of accidental damage to the environment, who would be responsible for the restoration costs? Under the present system, is it the person who causes the pollution, or is it the taxpayer?

10:30

Allan Bowie: Pesticide contamination can be quite serious. If we have a contractor in to spray, he is obliged to have insurance. We know that if he makes a mistake, he is liable for the clean-up, whatever that entails. In that example, it is the third party who is liable, not the landowner. If the landowner makes a mistake when he is doing the job, he is liable. That is quite clear.

Bill Wilson: You are saying that the landowner would be liable. The Government could go to the landowner and tell them that they would have to pay to clear up the contamination. The landowner could not say that they did not want to clean it up because it was caused by an accident that happened when they were carrying out a legal activity.

Allan Bowie: As far as I am aware, if the mistake is made by the landowner, he is liable to clean up the contamination. That is the polluter-pays principle. If the contamination is caused by a third party, such as a contractor, he is liable. We know that when we employ contractors to do the job.

Jonny Hughes: That is the situation under contract law. There could be a situation in which the landowner has not contracted someone to come in and do operations on their land but a third-party, which might have nothing to do with that land, has caused contamination. I take you back to the example of the pollution of the Doñana national park in Spain. The owners of the land had nothing to do with the mining operations that caused the pollution event. In effect, their land had been destroyed and they were liable for the clean-up costs—although, obviously, the cost was then passed to the taxpayer. The operator that caused the pollution event was not liable.

Bill Wilson: Mr Bowie referred to gold plating. Will you give me examples of where you think that the regulations are gold plated and where you think that they will make the life of a farmer unreasonably difficult—or at least more difficult in an unreasonable manner?

Allan Bowie: That is a very good question. Farmers' definition of gold plating varies, as you would expect. We have issues with good agricultural practice requirements and the good agricultural and environmental conditions. People think that there is too much legislation, such as on poaching or on land near a waterway. However, farmers are coming to realise that they have to be aware of the consequences of actions in their farming operations. That is where there has been a change in the past decade. You will find that a lot of farmers have fenced off the river-ways and have buffer zones. There is no need for extra legislation to provide for that.

Bill Wilson: I am quite happy to accept that farmers take their environmental responsibilities much more seriously; I have no doubt about that at all. However, what I am trying to get to is whether you think that any particular aspect of the regulations will cause an unreasonable burden. Is there a lack of fairness or reasonableness in how you are being treated or in what you are being asked to do?

Allan Bowie: I hark back to the point that current legislation, if imposed correctly, is enough. We are in the business of producing food. We are fairly aware of the consequences of our operations on the environment. If we tighten up the current procedures, there is no need for an extension to the legislation. It is pertinent to say that 70 per cent of respondents think that there is no need for that. We stand by that.

Elaine Murray: We are almost getting into a different discussion. It sounds as if you are arguing against the environmental liability directive altogether.

Allan Bowie: No.

Elaine Murray: You just do not want its requirements to be extended to SSSIs and Ramsar sites.

Allan Bowie: Exactly.

Elaine Murray: I do not think that this is an issue of extra red tape or anything of that sort. A responsible farmer who knows that they have an SSSI or Ramsar site on their land would not be polluting it anyway. If the requirements were extended, it would be to catch the occasional operator who does not treat the site with adequate respect. It would not make a difference to your members, because the vast majority of them would be careful anyway.

Allan Bowie: It is the management of the sites that is crucial. If the management is done correctly within the current legislation, everything is okay. Jonny Hughes seems to be talking about the what-if factor, which has not really raised its head. The management of sites has been tightened up in the past decade.

Elaine Murray: You argue that the regulations would not be necessary because there is not a problem

Allan Bowie: The NFUS would like to think that there would not be a problem if everyone managed sites correctly.

Jonny Hughes: The partial regulatory impact assessment found that, compared with one additional case every two years, there would be three or more cases a year if SSSIs were included in the regime.

I want to reinforce the point about legal clarity. The directive could work both ways for farmers—with them and against them. Paragraph 3 of annex 1 of the environmental liability directive says that

"the damaged area in relation to the species or to the habitat conservation"

has to be assessed at

"local, regional and higher level".

Depending on the interpretation of the directive—and, probably, on how case law pans out in Europe—we could end up with a much stricter regime if we go down the favourable conservation status route rather than the application of the site integrity test under the SSSI provisions.

An extension to the SSSI provisions would be a lot clearer. The favourable conservation status test is a lot more ambiguous and could result in a much tighter regime for farmers. You might want to consider the opportunities that are afforded by an extension to SSSI integrity in terms of legal certainty. At least you would know where you are with that.

Liam McArthur (Orkney) (LD): You referred to the partial regulatory impact assessment. I appreciate that that piece of work was done by the Scottish Government, which means that my question might be better asked of the cabinet secretary, who is sitting behind you. However, as you prayed it in aid of your position in your written evidence and again this morning, I would like you to comment on it.

The regulatory impact assessment cites benefits of £316,000, compared with a total cost of £93,000. How are those figures arrived at? Is the £316,000 the level of investment in maintaining SSSIs, which would be under threat if accidents should occur? How is the £93,000 made up? Who is liable for it currently and to whom would the liability shift?

Jonny Hughes: I am not in a position to answer the questions about the detailed figures. I would have to come back to you on how the figures were derived.

Liam McArthur: Mr Bowie?

Allan Bowie: Like Jonny Hughes, I am not in a position to comment on the figures.

John Scott: You say that the Government estimates that there could be up to 10 cases of environmental damage. Can you give us one example of such a case? I might not have been listening adequately, but I am having difficulty in getting my mind round what a case might be.

Jonny Hughes: I think that you mentioned a few yourself. They include structural damage to SSSIs that would damage the integrity of a site—we have cited the example of a track going through peatland. Similarly, if there is a point-source pollution event that then pollutes a watercourse or a body of water, that would constitute a trigger for the environmental liability directive. A number of examples could be given. Perhaps we should have included some in our briefing.

Alasdair Morgan: You mentioned three extra cases a year if the SSSIs were included, but the same memorandum says that the average cost per case was £22,000, so we are arguing about £66,000. Is that correct?

Jonny Hughes: Those are the estimated figures. I can only go by the figures that have been provided in the assessment; we have not done our own analysis.

Bill Wilson: I get the impression that you think that this will have an effect not on landowners or people who are contracted by landowners, but on third parties—a neighbouring landowner, a passing tanker or a mine owner. Is that interpretation correct?

Jonny Hughes: That is part of it, although I would not necessarily say that it is the only part of it.

Bill Wilson: But that is where the biggest effect will be. Is that correct?

Jonny Hughes: In terms of the SSSIs, certainly.

Allan Bowie: We are acting only on behalf of our farmers, whether they are tenants or landowners. I am pretty sure that insurance would be in place for third parties. The impact of a tanker incident up the west coast somewhere would be major. However, the NFUS submission is concerned with the farmers, their systems and the SSSIs.

Bill Wilson: What about adjacent landowners? What if a landowner spills diesel, and it goes down a watercourse into the next farmer's land, where it causes damage to an SSSI? Presumably the farmer who had the SSSI would not be covered, because the spill would be the fault of a neighbouring farmer, with whom he has had no contract.

Allan Bowie: I am sure that insurance would be in place to cover that. If the polluter could be identified—and I think that they could be, if the spill involved diesel—the case would be simple: the neighbouring farmer would be responsible and liable. You know what farmers are like: if one farmer knows that their neighbour is responsible, they will ensure that they are held to account.

The biggest concern involves trying to pinpoint a polluter in a huge catchment area.

John Scott: In light of the foregoing, I should have declared an interest, in that I am a farmer and landowner. I do so now, retrospectively.

The Convener: I think that we have given the issues a fair hearing. The committee will consider the instrument again on 10 June, when the Minister for Environment will move the motion to seek the committee's approval of the instrument.

I thank the witnesses for attending. If you have any follow-up information for us, please supply it to the clerks as soon as possible.

10:41

Meeting suspended.

10:42

On resuming—

Waste Batteries (Scotland) Regulations 2009 (Draft)

The Convener: I welcome the Cabinet Secretary for Rural Affairs and the Environment,

Richard Lochhead, who is here to discuss the draft Waste Batteries (Scotland) Regulations 2009. With him from the Scottish Government are Louise Miller, the head of branch 2 of the solicitors food and environment division, and Kevin Philpott, the waste regulation senior policy officer.

The Subordinate Legislation Committee commented on the instrument at its meeting yesterday, and members have those comments before them.

The minister is here to answer questions on the content of the instrument, before we move to the formal debate under agenda item 4. Officials may contribute under agenda item 3 but cannot participate in the formal debate. I invite the cabinet secretary to make a brief statement on the affirmative instrument.

The Cabinet Secretary for Rural Affairs and the Environment (Richard Lochhead): I invite the committee's approval of the regulations to transpose parts of the European Union batteries directive, which introduces producer responsibility for waste batteries. The directive's key elements are that it will make battery manufacturers and importers financially responsible for the collection and recycling of spent batteries; set minimum standards for the content, storage and treatment of waste batteries; and prohibit landfill and incineration of whole industrial and automotive batteries.

The first two elements are transposed by UK regulations. The directive's producer responsibility provisions are transposed on Scotland's behalf by the UK Government, as explained in my letter to the committee on 30 April. The UK Government has also made regulations on the reserved matter of restricting the design and marketing of batteries containing hazardous materials. That, too, was explained in my letter of 30 April.

The instrument that is before the committee deals with devolved aspects of waste management, for which separate Scottish regimes exist and for which it makes sense to have purely Scottish regulations.

The instrument implements the prohibitions on the landfill and incineration of untreated industrial and automotive batteries. It deals with new minimum standards of treatment by amending existing legislation permits and licences. It places a duty on the Scottish Environment Protection Agency to impose conditions on new licences and permits to reflect the new treatment standards, which are that waste batteries must be drained of fluids and may be stored only on an impermeable surface, in suitable containers and under weatherproof cover.

10:45

Further changes amend the conditions for activities that qualify for an exemption from a waste management licence to reflect those treatment provisions. For instance, the Environmental Protection Act 1990 is amended so as to exempt battery collection points from the need for a waste management licence, where the collection point is part of the producer responsibility collection network. Obviously, that will make collection easier and cheaper and thus further encourage recycling.

Taken together, the UK and Scottish instruments transpose the batteries directive in Scotland. Subject to Parliament's approval, the regulations that are before members will come into force on 6 July. All provisions will become effective immediately, except the prohibitions on the incineration or landfill of industrial and automotive batteries, which will come into force on 1 January 2010 to give the industry time to install the necessary treatment capacity.

The Scottish draft regulations were the subject of consultation in December 2008 with the UK Government's draft producer responsibility regulations. There was no substantive comment.

The ban on the landfill and incineration of untreated industrial and automotive batteries and the introduction of higher management standards reflect the Scottish Government's policies on sustainability, recycling and protection of the Scottish environment. Therefore, I commend the regulations to the committee.

The Convener: Thank you, cabinet secretary. I invite questions from members.

Liam McArthur: The letter from the cabinet secretary dated 30 April states:

"These Regulations will transpose the waste management elements of the Directive that do not derive from producers' or distributers' obligations."

It says that the regulations

"exempt the need for collection points for waste portable batteries to be licensed where set up in discharge of producers' or distributers' obligations".

That may make sense, but it perhaps leaves open the issue of the conditions that will apply to such collection points—their duration, extent and oversight. Obviously, collection points will exist for gathering together materials that clearly cannot go unregulated, but how will they be governed if they sit outwith the parameters of the regulations?

Richard Lochhead: The usual requirement not to pollute is in place for all collection points, but we are exempting the collection points for batteries from the requirement for a waste management licence in order to encourage the existence of as many such collection points as possible for the

public's use or for the businesses that are affected. The only regulations that will apply to those collection points will be the standard regulations for preventing pollution.

Liam McArthur: I would certainly encourage as light a touch as possible, but we should ensure that that does not bring our approach into disrepute as a result of people setting up collection points in inappropriate locations.

Richard Lochhead: Yes. The directive instructs that those collection points should be exempt from the other licensing conditions. The existing standard regulations to prevent pollution will remain in place for collection points for such materials. People will not have to apply for a waste management licence for such collection points, as they will simply be for the purpose of collection.

The Convener: Agenda item 4 is the formal debate on the instrument. I remind members that officials cannot participate in the debate.

I invite the cabinet secretary to move motion S3M-4193.

Richard Lochhead: I am sure that the committee recognises that the purpose of the regulations is to encourage recycling, protect virgin resources on the planet, and help us to move towards a zero-waste society.

I move,

That the Rural Affairs and Environment Committee recommends that the draft Waste Batteries (Scotland) Regulations 2009 be approved.

Motion agreed to.

The Convener: I thank the cabinet secretary and his officials for their attendance.

10:49

Meeting suspended.

10:51

On resuming—

Marine (Scotland) Bill: Stage 1

The Convener: This is the committee's first evidence session on the Marine (Scotland) Bill. Scottish Government officials will explain each part of the bill in order and take questions on each part separately. I welcome the panel: Stuart Foubister, divisional solicitor, solicitors food and environment division of the Scottish Government; David Palmer, branch head of the marine strategy branch; Linda Rosborough, deputy director, marine planning and policy; Chris Bierley, policy officer, nature conservation branch; Phil Alcock, policy officer, marine biodiversity policy and sustainable management branch; Philip Robertson, senior inspector of marine archaeology; and Ian Walker, policy officer, marine biodiversity policy and sustainable management branch.

I invite officials to make opening remarks and to explain part 1 of the bill.

Linda Rosborough (Marine Scotland): We should first consider the links between this bill and the UK Marine and Coastal Access Bill, which the committee considered in January. The two bills are interconnected. Both have a long history and took a long time to be formulated, working with stakeholders throughout Scotland and beyond. Together, they seek to achieve joined-up management of the seas. This bill covers inshore Scottish waters out to 12 nautical miles. The UK bill covers the sea from 12 to 200 nautical miles, and also provides for additional functions for the Scottish ministers.

The bill has had a long genesis. We have had extensive stakeholder engagement, so there is a fair amount of consensus around Scotland on much of the bill's content. The bill is very much a framework that will provide flexibility in different parts of Scotland. For example, in relation to marine planning, the bill will enable the arrangements that are put in place for the Clyde to be different from those in Shetland.

The key elements are a system of marine planning; a new system of streamlined licensing, bringing together many of the disparate elements that currently govern operations in the marine environment; and a new system of marine nature conservation, enabling the designation of marine protected areas. The latter complements the existing powers under European legislation and provides for designation relating to Natura 2000 sites. In addition, the bill makes provision for seals—that was a source of considerable public interest during the consultation on the bill—and

sets out enforcement arrangements across all the different measures.

Part 1 defines the area to which the bill applies. It sets out that the context is Scottish waters up to the high-water spring tide.

The Convener: Thank you. Do members have any questions on part 1?

John Scott: Good morning. Thank you for coming before us. I want to ask about the definition of "sea". Section 1 defines the "Scottish marine area" as

"the area of sea within the seaward limits of the territorial sea of the United Kingdom adjacent to Scotland and includes the bed and subsoil of the sea within that area."

That is, essentially, from nothing to 12 nautical miles around Scotland. However, "sea" is defined—except in part 4—as

"any area submerged at mean high water spring tide"

and

"the waters of every estuary, river or channel, so far as the tide flows at mean high water spring tide."

How was that definition arrived at and why is it different in part 4? We seem to have two definitions of "sea".

Stuart Foubister (Scottish Government Legal Directorate): The definitions reflect the existing position in regard to licensing. The coverage in the Food and Environment Protection Act 1985 is, essentially, the same as what is set out in part 1. A policy decision was taken that different coverage was wanted for part 4, on marine protection and enhancement.

John Scott: You are entirely happy with the two definitions.

Stuart Foubister: Yes.

The Convener: There are no further questions on part 1. I invite the officials briefly to explain part 2.

David Palmer (Marine Scotland): Part 2 covers marine planning and provides a range of powers for ministers to create national and local marine plans. It provides for the creation of marine regions and provides a range of functions for reviewing, amending, monitoring and reporting on those plans to keep them up to date. It also provides ministers with the powers to give directions to marine regions under certain conditions in order to carry out certain functions in those regions. It is the crux of the planning process.

Section 8 is fairly key, as it allows ministers to delegate planning functions to the marine regions. It also sets out how the marine regions should be designated and who might be an interested party in those marine regions.

Alasdair Morgan: The bill goes into detail about how the marine plans will be created, giving timetables and stating who will be consulted, but it does not explain what marine plans—either national or regional—will look like. What will be in them? Will I recognise one if I fall over it?

David Palmer: We have to recognise that we have not seen a national marine plan—certainly not a Scottish national marine plan—before. It is a new departure for us, without a shadow of a doubt. Any plan involves setting objectives, indicating how they will be achieved and giving some sense of which of them have priority and of the wider strategic issues that are considered important in stewardship of the marine area. At national level, there will be a high-level strategic plan that sets out how we see the marine area going forward. At regional level, the focus will be on more regional and local issues. One reason why we have different tiers is to allow important local issues to be expressed. Plans should express the common aspiration for the local marine area and set out the vision for that area and how it will be achieved.

11:00

Alasdair Morgan: Presumably, the objectives of regional plans will be the same as those of the national plan, but regional. How will regional plans be merged into the national plan? Let us take the issue of the offshore production of renewable energy in a planning area. If the national plan says that we anticipate that we will produce X megawatts of power in the Scottish seas, but the objective is not taken on in any of the regional plans, on the basis that someone else can do it, how will the matter be resolved? The same could happen in other areas.

David Palmer: The broad theory is that regional plans should sit within the envelope of the national plan. We do not propose to take any formal powers in the bill to force regions to take particular shares of anything. Basically, the bill provides for ministers to adopt plans and, by so doing, to make them formal and enforceable. Where ministers do not adopt plans, they will have no status. If it were thought that a regional plan did not contribute its fair share towards meeting the renewables target or any other target that had been set, there would have to be some discussion—starting at the level of officials—with the region concerned about how the national targets would best be expressed at regional level.

Alasdair Morgan: When the Parliament's Enterprise and Culture Committee examined renewable energy in the previous session, it highlighted the lack of a national plan for

renewable energy, which led certain parts of the country to feel that they were being asked to shoulder too much of the burden of onshore wind farms. One can see the same problem rearing its head in relation to marine plans.

David Palmer: I see the concern. I anticipate that at national level there will be a plan for marine renewables, including offshore wind, wave and tidal energy. The question is, how will the plan be relayed down or reflected at regional level? As the bill stands, that is for regions to decide, to some extent. The fundamental point is that, potentially, renewables are valuable economic activity. Most of the areas in which marine renewables might be appropriate are rural and peripheral, so such economic activity could be important, and we tend to think that those areas will be keen to pick up the challenge. That is why ministers have not taken powers in the bill to force areas to do so.

Alasdair Morgan: Clearly, some interesting tensions could arise in this area—and many others—between what local people see as their regional objectives and what you see as the need for them to contribute towards meeting national objectives.

David Palmer: That is entirely right. The bill provides for a framework that is flexible, largely because we are seized of the fact that conditions, industries and interests differ around the Scottish coasts—concerns in the Solway are different from those in Shetland. We need a system that allows such concerns to be expressed at local level. That is one of the strengths of the bill, but, as you point out, it has the potential to create a lot of tension in the process.

Linda Rosborough: We have some experience through pilot work on marine planning. The delegation to the regional level is a distinctive element of the bill. Part of the thinking behind that was the importance of ensuring that we have a partnership approach to the management of the sea. Building in a strong local dimension from the outset, rather than having a system that is entirely top down and only at the national level, is key to effective management for the future. That creates a potential for the sort of tension that Alasdair Morgan outlines, but it also has the potential to provide a good way forward through which ideas are developed at local and national level.

Alasdair Morgan: How is it envisaged that the system will interact with the existing land planning system?

David Palmer: The bill contains a requirement for marine plans to take account of terrestrial plans. That requirement is expressed formally. We intend to amend the regulations under the Town and Country Planning (Scotland) Act 1997 to make marine plans a material consideration in terrestrial plans. The two systems will be joined up functionally in that way.

In integrated coastal zone management, the coastal strip is important for joining up the two planning systems. It depends on how the situation pans out, but we anticipate using the direction-giving powers to ensure that the two planning systems in the coastal strip are joined together properly. The formal expression will be a requirement for both sets of plans to take account of each other.

The Convener: How set in stone or flexible will the plans be? If a community or planning authority that has decided not to have fish farms all of a sudden finds that the waters in the area are good for rearing a type of very expensive cockle or mussel or whatever, how will the marine planning authority be able to change the plan?

David Palmer: There are various mechanisms in the bill to allow plans to be amended. Section 7 is about keeping relevant matters under review. Various powers will allow plans to be kept up to date. The key function is that ministers must adopt plans to give them statutory force. There is a duty to keep relevant matters under review, a power to amend and a power to withdraw plans. Those powers will provide an ability to renew plans and have them readopted by ministers and brought into force.

Liam McArthur: What independent appeals process is envisaged under the planning system? I am thinking particularly about requirements under the Aarhus convention.

David Palmer: Stuart Foubister knows more about the issue than I do, but the concept of appeals is not particularly relevant to plans per se. There is a provision on independent investigation in schedule 1—I am trying to find it, but I have lost it for the moment.

Stuart Foubister: It is in paragraph 11 of schedule 1, but it would not be correct to represent that as an appeals process.

Liam McArthur: Was the matter of compliance with the Aarhus convention raised during the drafting of the bill?

David Palmer: I look to Stuart Foubister for the legal aspect but, from the planning aspect, the bill is compliant with the convention, as far as we understand. I defer to Stuart.

Stuart Foubister: We have no reason to believe that it is not compliant with the Aarhus convention. The convention requires public participation, which is not the same as requiring an appeals process, and schedule 1 sets out provision for the public to comment generally on the preparation of plans.

Liam McArthur: It is not a huge leap from public participation to the public having a meaningful influence on the system in general.

Stuart Foubister: Appeals generally have the connotation of an appeal before a court or an independent tribunal. Such appeals would be quite difficult with plans, which do not deal with individuals' rights. Who, for example, would be the appellant in such a situation? At the end of the day, a plan is a statement of policy, not a legal judgment, and it would be quite difficult to present public rights as rights of appeal in connection with it.

David Palmer: Section 14 sets out the Court of Session's powers on applications made under section 13 relating to the validity of national and regional marine plans. A plan cannot be questioned in court but, under section 13, it can be taken to court on the grounds that it

"is not within the appropriate powers"

or

"that a procedural requirement has not been complied with."

Bill Wilson: The idea is to co-ordinate terrestrial and marine plans, but it is not inconceivable that a local authority's terrestrial plan might be in conflict with the marine plan. How will such conflicts be resolved?

David Palmer: That is an interesting question. We see local authorities being key stakeholders in the creation of regional marine plans and we hope that, as such, they will find some way of integrating the two planning systems. I find it difficult to envisage any circumstances in which a local authority will not want to be involved in the creation of the regional marine plan but if, for the sake of argument, that happened, there would always be the fallback of the legal structure, which makes it clear that marine plans must be material considerations within terrestrial plans and that marine plans must take account of terrestrial plans. Indeed, that is the fundamental legal basis for the integration of the two types of plan.

Peter Peacock: When responsibility is delegated to the marine planning partnerships, they will—in theory, at least—have a reasonable degree of influence and power if ministers approve their plans. However, at that point, a huge number of players will come on to the scene: the local authority, as you have just pointed out; fishing interests, including sea angling interests; offshore energy interests; oil sector interests; leisure interests; marine conservation interests and so on. Given that these regional marine planning partnerships could turn out to be enormous assemblies of people, can you say a bit more about your expectations in that respect? How many and what kind of people will be on the partnerships, and how will they get on to them?

David Palmer: It is difficult to be prescriptive about such issues, which is why we are trying to create a permissive framework in the bill. We are keen not to exclude any stakeholder or anyone with an interest. We are also clear that what might be an appropriate group of stakeholders in, say, the Solway will be different from what might be appropriate in the Shetland Islands. As I say, it is difficult to be prescriptive.

I understand that the creation of the area advisory groups under the water framework directive involved a fairly long process of gathering together stakeholders and, over 18 months, getting down to a core of stakeholders who had a strong interest in the issues and were willing to make the commitment. We have considered that model, which seems to have worked for the area advisory groups and would be possible under our approach, but the problem is that the process takes quite a while. An alternative approach would be simply to pick the stakeholders. I am not sure that that would be particularly representative; ultimately, it would depend on who was doing the picking, but I am not sure whether we want to go that way.

11:15

Peter Peacock: If I understand correctly, from a Government point of view, you are relaxed about whether there are 20, 50, 70 people or whatever in marine planning partnerships, as long as a way is found to make partnerships work.

David Palmer: That is right. They key thing at the end of the day is that they work.

Peter Peacock: So a workable approach has to be built up by consensus over time. I understand that.

A couple of weeks ago, we visited Peterhead Port Authority. Like numerous other organisations around our coastline, it exercises management functions through powers that have been delegated to it by act of Parliament. How will such port authorities relate to marine planning partnerships? Will they be subordinate in any sense under the new arrangements or will they be autonomous, as under the existing arrangements? In other words, could a marine planning partnership say to a port authority, "We want you to do this now"? What is the connection or the arrangement?

David Palmer: I hope—certainly in the case of Peterhead—that port authorities will be part of the regional marine planning partnerships. That works in many cases, and I hope that it will be the relationship between the two types of body. If you

have an interest in marine activities within a region, whether you are a port, in aquaculture or in renewables, you will want to be represented on the marine planning partnership. That is how the process will work fundamentally.

Peter Peacock: I agree with the principle that you have enunciated, but is there any sense in which regional marine planning partnerships, which will be the planning authorities, will be able to instruct or direct other bodies, such as port authorities, or will that not be the case?

David Palmer: Marine planning partnerships will create the plans, which will have to be adhered to, assuming that they have been adopted by ministers. All enforcement and authorisation decisions will have to be in accordance with the plans. The plan is the key, not the partnership.

Peter Peacock: My final question comes back to one of Alasdair Morgan's points. Given the potential number of partners on marine planning partnerships, is there a danger that to get agreement, planning policy will be at such a high level that it will not have much practical impact? If you get down to the detailed level, you might never get agreement because of competing interests. How do you envisage that working?

David Palmer: That is a danger, but I do not see any other way of attacking the problem. If you do not get into the detail, it is because you do not have consensus, which is the key thing. In our experience of the pilots, that is where progress can be made on the plans. If you do not have fundamental consensus, the whole thing becomes quite difficult.

Peter Peacock: If the policy was at too high a level, could the minister send it back and say, "I'm not approving it"?

David Palmer: Yes.

Linda Rosborough: The experience of people who are working on the pilots is that where there are problems in regions, people reach a shared understanding of what they are and start to look for solutions. Although it takes time to get there, the experience of the pilots is that people are actively looking at problems in a new way across sectors, because they have been brought together in a new marine planning body.

The Convener: Is not the partnership approach potentially anticompetitive? We visited the north-east. If, for example, Aberdeen and Peterhead harbours and, to a lesser extent, Fraserburgh harbour were all competing for business, but the marine planning partnership decided that one harbour should do more than another, that approach could end up being anticompetitive.

Linda Rosborough: Because the process is open and transparent and follows clear public participation procedures, the sort of problem that you describe should be mitigated. It is a potential problem, but the fact that the process is open and formal should minimise the risk.

The Convener: But there could be lobbying of all the partners on the marine planning partnership, and if one harbour had a stronger voice than another, the harbour with the weaker voice might be disadvantaged.

Linda Rosborough: In that situation, people would make representations and we might hold inquiries into the plans.

The Convener: There are no further questions on part 2. Let us move on to part 3, which deals with marine licensing.

David Palmer: Part 3 sets out a range of things. It creates a requirement for the marine licence, defines licensable activities and allows those licensable activities to be extended by order. It allows for certain exemptions from licensing and for appeals against licensing decisions, and it creates certain offences for the enforcement of licensing. It also creates a set of enforcement notices, a series of civil sanctions powers effectively to streamline the process back out of the courts, and a range of supplementary powers, such as the powers to issue stop notices and emergency notices. In addition, part 3 gives ministers the power to create a registration system to allow activities that may not have a huge environmental impact to drop out of the licensing system.

The licensable activities reflect the bringing together of the Food and Environment Protection Act 1985 licence and the Coastal Protection Act 1979 licence. Those licences cover the depositing of materials into the water and, broadly, navigation within the water. Part 3 also allows for the streamlining of the new marine licence together with consent under section 36 of the Electricity Act 1989 for renewable electricity generation. Elsewhere in the bill, in the conservation section, the power to provide wildlife licences is returned to the Scottish ministers in order to enable all the licences to be drawn together in a reasonably streamlined process.

That is a brief summary of the licensing requirements.

John Scott: Which organisation will be the point of contact for marine licences? Will the same body issue all licences?

David Palmer: Marine Scotland will be the point of contact, but it will not issue all licences. This part of the bill creates the ability for local authorities to give up the development consent for aquaculture, but the power to issue such a consent still rests with local authorities.

John Scott: What will the threshold be for activities to be registered rather than licensed? That seems to be a bit of a grey area.

David Palmer: It certainly is. We will answer that question on the basis of research. It is similar to the process for the registration of controlled activities under the water framework directive, whereby a system was created that allows small projects to be registered rather than licensed. That is what we want to do in the context of marine licensing, and we hope to build on the work that has already been done in setting the environmental threshold above which someone will have to get a licence but below which they will be required only to register.

John Scott: It was a fairly vague question but, with respect, that was a fairly vague answer. For those who are directly concerned, it is an important matter. Can you give us any indication—even a ballpark figure—of the threshold? We will not hold you to any figure that you give us at this point.

Linda Rosborough: I can give you one example. At the moment, under FEPA, there are a substantial number of applications for single pipes for discharges from single dwellings. The discharge from those pipes has to be permitted by SEPA under the controlled activities regulations, but putting the bit of plastic in the water has to be permitted under FEPA as a licensable activity. That is an example of a fairly small instance in which a substance is put into the marine environment. We need to consider the science behind it, but we might say that that was beneath the bar for the marine licence. There would still be the SEPA requirement for the discharge, which is a continuous activity, but the one-off placing of the plastic pipe might be the sort of thing that we could exempt. Quite a substantial proportion of FEPA licence applications at the moment are of that nature—small activities with a fairly modest impact.

The Convener: Do you anticipate that a cost will be attached to the application for marine licences? If so, what is it likely to be? Will there be a simple application form to fill in, or will it be a licence for consultants to charge applicants loads of money for drawing up applications?

David Palmer: Obviously, there will be a cost. There is a charge for the FEPA licence, although the charges are fairly out of date. There is provision in the bill to recover the costs of the licensing function.

I take your point about consultants, but I would hope that we can build a reasonably user-friendly, interactive licensing process that allows people to interact with the licensers to get sensible answers so that they need make only one application. If they have to do research, it should be done in a way that informs all sections of the licensing application, and not just so that it answers one question and has to be done again at a later stage. I hope that we will have a reasonably smooth, coherent system—that is the vision. With all of these things, it can be difficult to anticipate what reality might shove at us, but we are trying to achieve a vision of a reasonably integrated and streamlined licensing process, with—when we can manage it—one application and one piece of paper coming back.

John Scott: Section 20 states:

"In determining an application for a marine licence … Scottish Ministers must have regard to—

(a) the need to—

(i) protect the environment,

(ii) protect human health,

(iii) prevent interference with legitimate uses of the sea".

What weight will be attached to each of those criteria? Discuss.

David Palmer: I will defer to Stuart Foubister's legal view, but as far as I can see they have equal weight.

Stuart Foubister: There is nothing about weighting in the section—there is simply a requirement to have regard to those factors. Each factor must be borne in mind, but there is no question of the legislation requiring any particular weighting.

John Scott: So you are saying that there will not be one preferred area over another and that human health will not be more important than the environment or the environment more important than legitimate uses of the sea.

Stuart Foubister: Consideration will be case by case. It is not about saying in advance that one factor outweighs another; it is about taking into account the factors and making a balanced decision in each case.

John Scott: Fair enough.

How will the proposed marine licensing regime and the proposed marine planning system fit together and integrate?

David Palmer: The basic requirement in the planning system is that all enforcement and authorisation decisions are taken in accordance with the marine plan. In effect, any licence decision should be taken in accordance with the marine plan—that is how the two link together.

11:30

Alasdair Morgan: There is a form of fishing called scallop dredging. Although that does not

involve dredging of the kind that would normally be thought of, are you happy that the references to the licensing of dredging do not apply to that activity?

David Palmer: I think so.

Stuart Foubister: I would not have thought that a form of fishing known as dredging would generally come within a bald reference to dredging, but it is something that we can look into. There is a power to make exemption orders if there is any question of that being caught.

Alasdair Morgan: Dredging could involve using any device to move any material. Whether a scallop is material—

Stuart Foubister: I would not have thought so in that context.

Alasdair Morgan: It would be useful to get that clarified. If a scallop is not material, what is it?

The Convener: There are no further questions on part 3. Let us move on to part 4, on marine protected areas.

Linda Rosborough: I will introduce part 4 briefly, but my colleagues will chip in.

The nature conservation provisions complement other powers that ministers have in relation to designations under European legislation. They enable ministers to designate marine protected areas, which is a more flexible power than ministers currently have. They provide for different types of marine protected area for conservation purposes and for demonstration purposes in testing out different ways of managing the marine environment. It is a unique feature of the bill that it also provides for the creation of marine protected areas for historical purposes—for the protection of either wrecks or submerged historical features. The bill thus provides for an integrated method of protecting historical and natural features in the marine environment.

The specific provisions relating to the restriction of activities in order to protect marine protected areas are provided for in a protection order—

Chris Bierley (Marine Scotland): A marine conservation order.

Linda Rosborough: Such an order will be the subject of a negative resolution instrument in relation to the requirement of a specific site. There are also provisions relating to the management of marine protected areas.

Peter Peacock: We heard evidence, at a conference that we attended a couple of weeks ago on the marine environment in general, that there is probably a lack of scientific understanding of a lot of Scotland's seas. The bill creates powers and provisions for improving that, but if one accepts that there is a lack of scientific evidence what will underpin the decision to make a conservation order or to designate a site for conservation reasons in its absence? Might the lack of such evidence itself be a reason for designation?

Linda Rosborough: The thrust of the bill is that the designation of sites must be based on sound scientific evidence. The basis on which a site is to be designated will have to be researched thoroughly before it can be put forward for designation.

Peter Peacock: Does that imply that a long period could elapse before a site could be designated? I presume that a huge amount of investigative scientific work would have to be done over a long period.

Linda Rosborough: We have various international commitments to designate marine protected areas and to be part of a wider network, and we are looking to work to the necessary timescale to meet those commitments. That will require work, and we have been in discussions with Scottish Natural Heritage, which is our adviser in the inshore zone, about identifying the sites to enable us to meet those commitments.

Peter Peacock: Are you saying that, because of the European imperatives, precautionary principles are being pursued? Where is the balance between, on the one hand, taking a precautionary approach to protecting an area without necessarily having the full science and, on the other, having the full science to make the decision?

Chris Bierley: The science will never be perfect, so when we designate sites we have to use the best available science. We have a project running on the criteria for the designation that we are going to undertake. Phil Alcock might want to say more about that.

Phil Alcock (Marine Scotland): With SNH and the Joint Nature Conservation Committee, we are developing criteria to give scientists and regulators an idea of how MPAs can be designated both inshore and offshore. We anticipate that that will go out to consultation in the late summer.

Peter Peacock: You said that the Scottish Government is obliged to designate certain sites under European law. Will it delegate that obligation to the regional marine planning partnerships? If they took a different view, who would make the decision? I assume it would be the Government. Can you require the regional planning partnerships to deliver for you?

Linda Rosborough: The power to designate sites will be for the Scottish ministers, and there is

no intention to delegate it to Scottish marine regions or planning partnerships.

On how the system will work in practice, there will be a set of iterative processes. The national marine plan will be worked on in advance of the regional plans. We have international commitments—I am not sure that I would go as far as to call them duties—that require us to contribute to the network of marine protected areas, and that is to be done on a fairly short timescale. I anticipate that much of the initial work on marine protected areas will be done in the first couple of years and that much of the local marine planning will be on a slightly more truncated timescale. I do not anticipate that there will be a direct conflict.

There will be an iterative process on both sides. Marine Scotland will take forward the work on the network of MPAs in conjunction with the statutory advisers and the work on marine planning on a slightly different track at a local level.

Peter Peacock: Irrespective of the bill, part of the process that you describe would have to go ahead anyway because of the international commitments that have been made. You said that you will not delegate the function to the marine planning partnerships, but I presume that the planning partnerships could make bids to the Government in respect of certain parts of their region, as some of them are in protected areas. I see people nodding, so I take it that that is correct.

Linda Rosborough: Yes. Indeed, the bill specifically mentions that and recognises that communities might have their own aspirations for marine protected areas.

Peter Peacock: Okay. You talked about a network of sites as if it will be ecologically coherent and the sites will be joined up, but if the initiative comes from the regions the approach could be somewhat ad hoc. Will you say a bit more about the potential balance between the ad hoc desires of communities and your international obligations to create a coherent network of sites?

Chris Bierley: Any local or regional site would have to meet national priorities and would have to be shown to be worthy of being a marine protected area.

Peter Peacock: So you have in mind a coherent network of sites that have an ecological connection even though they might not necessarily have a physical connection. All the sites together would add to the overall picture.

Chris Bierley: That is correct. The new sites, along with existing sites designated under Natura 2000 and suchlike, will form a coherent ecological network. That is what we are looking for.

Peter Peacock: Some sites will be partly driven by international commitments, irrespective—arguably—of local views. Will marine planning partnerships consult on proposals at local level? Would that process take place whether or not this bill existed? What does the bill add to the processes of consultation and future management?

Linda Rosborough: At the moment, we do not have powers to designate marine protected areas, apart from specific powers that stem from European legislation, which are limited and inflexible. The bill will provide a more flexible basis for designating marine protected areas and for the protection of habitats other than those already provided for in the habitats directive. It will enable a wider consideration of what needs to be protected, beyond the consideration that is required by European legislation, which is narrow in some areas.

Peter Peacock: I take that point. What might be the role of the marine planning partnerships in driving the local consultation processes? Would they have a role, or would it be a role for SNH or another agency?

Linda Rosborough: The key adviser would be SNH, and the key basis for designation would be science. Local involvement in the marine protected areas would be more modest. That lies down the road while people get to grips with marine planning.

Peter Peacock: Is there a definite commitment to consult on any proposal for a marine protected area?

Linda Rosborough: Yes.

Chris Bierley: Yes, that is correct.

Liam McArthur: I want to go back a little and ask about mapping exercises, linking them to what Peter Peacock was saying about existing statutory requirements and the aspirations of various regional planning partnerships. In the renewable energy sector, people are being candid and saying, “The more we learn, the more we realise we do not know about what is happening on the sea bed.” For submerged archaeological sites, the renewables sector relies very much on mapping exercises undertaken by the oil and gas sector.

With the bill, where will responsibility lie for the costs of mapping exercises? Will findings be shared among all the relevant parties, so that costs are not borne repeatedly and with no added value?

Linda Rosborough: You are right to suggest that the gaps in the data are large, as will be the cost of collecting the data that will make our knowledge perfect. A big component of the cost of preparing marine plans at regional level is the cost

of collecting data. That is the most important gap, and filling it will be a key function of Marine Scotland. A lot of that will involve working with people who hold data at the moment. Much of the data that exist are not well shared or integrated. Some of the boats that are already monitoring Scottish seas are collecting data for one purpose and could collect data for other purposes.

11:45

Liam McArthur: Are you reliant on the collaborative approach, to which you have already referred as underpinning a lot of the planning that is going to take place, or will there be requirements, in undertaking the work, that the data will be extended if necessary and made freely available when possible?

Linda Rosborough: I am sorry, but I do not quite follow the question. Requirements on whom?

Liam McArthur: Are you reliant on the good faith of those who are required to undertake the mapping to make the information freely available or to extend it more widely than they initially planned in order to ensure that it is done in a cost-effective way? Or will there be a requirement in the bill for a degree of transparency about the data that are gathered?

Linda Rosborough: The bill does not contain a specific requirement for data gathering. We are working with the component parts of Marine Scotland and beyond to move towards the sharing of data and a single basis on which data will be shared. We are not meeting any obstacles to that, and I am not entirely sure what the points of conflict might be.

Liam McArthur: I think that there is enough evidence of that in the context of the development of the marine renewables sector to date. The individual developers have been very guarded about the evidence that they are building up. By contrast, when we attended the Fisheries Research Services marine laboratory when we visited Peterhead and Aberdeen recently, we saw the mapping exercise that it is undertaking, the results of which will rightly be made extensively available. There are different pressures on marine energy developers and bodies such as FRS, but, if the mapping exercise is to be completed in the most cost-efficient way, collaboration and a pooling of the resource will be required.

Linda Rosborough: Yes.

Phil Alcock: We are undertaking a nationwide study in conjunction with the UK Administrations to map the sea bed habitat out to 200 miles, to inform marine protected area development and marine planning in the UK. We expect the results of that study to be ready this time next year.

Linda Rosborough: We are also working with the renewables industry specifically to identify what information can be collected and shared. We acknowledge commercial concerns about aspects of the data, but we are working with the industry to identify where we can co-operate without jeopardising people's commercial interests.

Philip Robertson (Historic Scotland): You referred to sites of archaeological interest. Work is going on around Orkney that Historic Scotland has been supporting in a small way. We recognise the significant challenges that there are around the sharing of data and knowledge, but we feel that we can work closely with Marine Scotland in the wider work that it proposes on surveys and with bodies such as the Royal Commission on the Ancient and Historical Monuments of Scotland, which has a role in that area. Collaboration will certainly be required.

Bill Wilson: As we are talking about historical marine protected areas, I will start with that. Can you give me an idea of the size of the sites that might be so designated? What advantages will the new designation offer over the present protection for such sites?

Philip Robertson: Under the existing mechanisms in the Protection of Wrecks Act 1973 and the Ancient Monuments and Archaeological Areas Act 1979, we have 15 protected shipwrecks in Scottish waters for which the Scottish ministers have responsibility. Those will be eligible for protection under the new mechanism. Section 1 of the Protection of Wrecks Act 1973 will go, and underwater assets such as the German high-seas fleet wrecks in Scapa Flow, Orkney, are likely to be eligible for protection under the new mechanism.

Beyond that, growing evidence is emerging from around the UK—especially from the work in the Shetland and Orkney islands—of submerged prehistoric evidence that is related to the rising sea levels and the submerging of the land mass after the end of the last ice age, when there was a period of human settlement in certain parts of Scotland. That type of site tends to be revealed in the form of artefact scatters. There is also a site in the eastern Firth of Forth that consists of a collection of prehistoric-type stone anchors. We do not have a mechanism for recognising the national importance of such things, and we think that the new mechanism will be able to do that.

There has been widespread consideration of the case for change in marine heritage protection throughout the UK since 2004. The responses to a consultation in which devolved Administrations were involved and subsequent work by two sector groups pinpointed that some of the legislation is widely considered by stakeholders to be quite burdensome. Under the 1973 act, a licence is

required merely on a "look but don't touch" basis for all designated wreck sites. We have also experienced problems in relation to certain other sites.

We think that we can capture a wider range of the site types that exist in Scottish waters to reflect the maritime history of Scotland in a more proportionate and effective way.

Bill Wilson: To jump back to nature conservation, section 59(5) states that where ministers are considering the designation of two sites that are considered to be equal in value, the minister may give consideration

"to any social or economic consequences of designation."

However, the bill also states that in all other cases, the issues for consideration are the

"desirability of conserving … marine flora or fauna"

and so on.

I am curious about that. To be clear, does that mean that if a site is identified as an area of scientific interest for particular biodiversity reasons, it must be designated, and that social or economic factors cannot be considered unless there is another equivalent site and it is strictly a choice between two possible designations that are more or less identical?

Chris Bierley: I do not think that there is any requirement to say that it must be designated. We are talking about using science to find those sites. If there is a clear reason why a marine protected area would be the best sort of mechanism to protect that site, the decision would go out to consultation, but there is not an assumption that everywhere that has something interesting in terms of biodiversity must be designated as a marine protected area or suchlike.

Bill Wilson: I understand that. Let us assume that you have identified an area as somewhere that should be designated. As I understand it, you cannot

"have regard to any social or economic consequences"

if you have decided on the basis of the science that that area should be designated, unless there is another area that you have decided, on the basis of the data that you have gathered, would be equivalent. Is that correct?

Linda Rosborough: Yes and no.

Bill Wilson: You are hedging your bets slightly.

Linda Rosborough: The issue was discussed long and hard within the framework of the sustainable seas task force. It stems from a desire to ensure that the sites that are protected are, from a scientific point of view, the most genuinely important sites. It is a power to designate, rather than a duty to protect any specific amount of sea or any specific sites.

The subject has been discussed in various places, and the overriding view of stakeholders and the policy that emerged was that science must be the predominating factor. That raises the issue of whether there are some circumstances in which socioeconomics might be an additional factor, and a discussion on that has led to the wording in the bill.

That section of the bill does not require that any particular sites be designated. It is intended, in policy terms, to lead to a situation in which the designation of such sites is justified on scientific grounds. That means that we should end up with good sites rather than a lot of mediocre sites, but it does not mean that we are required to designate any particular site.

Bill Wilson: I understand that, but your scientific criteria or threshold is a certain level of biodiversity or species richness, or the presence of a unique species. I presume that you must have some kind of threshold; otherwise you would simply be saying, "Well, we like this one, but we don't like that one." So, if you have data that show that a site is clearly a high-quality one, it would be designated regardless of any social or economic factors, unless there was an equivalent site.

Linda Rosborough: Not quite. For the reasons that I outlined, there is no duty to designate any particular site.

Bill Wilson: I understand that, but if you do it by the science alone, you must surely have a set of clear criteria for a designatable site.

Linda Rosborough: Yes.

Bill Wilson: So if a site meets those criteria, it must be designated.

Linda Rosborough: That is not what the bill says.

Bill Wilson: So you could have data that show that a site meets the criteria, but you might not designate it. The designation will not be done by hard science, because you can elect to ignore the criteria and the thresholds that you set.

Linda Rosborough: What we are getting at here is what is in and what is out. How the process works is that what is designated must meet the science bar; it is not about a balance between science and socioeconomics.

Bill Wilson: But if it makes the bar, do you have to designate it? The answer is no.

Linda Rosborough: Yes, because it is not a duty, but a power.

Peter Peacock: Did you consider in the drafting of the bill and in the policy considerations whether, when the bar has been met, there should be a duty on ministers to designate? Was that considered and positively ruled out? Or was it not considered?

Linda Rosborough: We have experience of other forms of nature designation that are felt to be rather inflexible. We were looking for more flexible powers through this bill than are currently available to ministers. The bill will allow ministers the flexibility to both designate and de-designate. The policy intention of the package of powers is to provide ministers with more flexible powers than they have through other legislation.

Peter Peacock: So it was a deliberate, positive policy choice.

Linda Rosborough: It was a policy choice. The thinking behind it was worked out with the sustainable seas task force, which led us to where we are now.

On duties, the other key issue is that we want to create a network that will be comprised of not just areas that the bill designates as protected, but areas that are designated as protected under other legislation and areas that are beyond Scotland. Ecological coherence and international commitments will come from a package of all those elements. That is the policy driver, rather than specific duties and measures in the bill.

Chris Bierley: Marine protected areas and the Natura sites will sit together with wider planning measures for the protection of our marine environment. From a policy point of view, we do not consider MPAs as a sort of target-driven exercise; we regard them as part of a more cohesive, holistic approach to the marine environment. We have put a duty in the bill for the Scottish Government to report to Parliament every five years or so on how designated MPAs have contributed to a national network.

The Convener: We have given that aspect a fair airing. We will move on to part 5.

12:00

Linda Rosborough: Part 5 will repeal the Conservation of Seals Act 1970, which was rather dated. In future, there will be an offence of killing, injuring or taking a seal. Permitted derogations will allow the taking of seals under licence in certain circumstances, such as to prevent serious damage to fisheries, netting stations and fish farms. That will put various industries on an even playing field and provide for a consistent approach to be taken to seal management, regardless of the industry and the time of year.

The bill provides for a licensing regime that will be administered by the Scottish ministers. Our intention is that the licensing regime will be based on the pilot that we have been operating in the Moray Firth, which provides for group licences that enable management of the biological abilities of the population to ensure that we do not irrevocably damage that population. The Natural Environment Research Council will still be our adviser on carrying out that responsibility.

The bill also provides for reporting on the numbers of seals that have been killed, which has not been a feature of any regime until now.

Peter Peacock: I welcome much of what you say, particularly about the Moray Firth approach. People seem to have found a pragmatic way of doing things.

Will any of the licence criteria have regard to animal welfare questions, such as the proficiency of the marksperson—if that is what such people are called nowadays—who might shoot seals? Does the Scottish Government think that there is an optimum number of seals? If so, what is that number?

Ian Walker (Marine Scotland): The existing Moray Firth plan includes a code of practice on what should be done when seals are being shot and provides for training for marksmen. There is already provision for that on a trial basis in the Moray Firth, and we intend to extend that provision to all licensing. [*Interruption.*]

There is no optimum figure for the number of seals. Rather than our indirectly intervening, it is up to the population to find a balance. You are probably aware that there are large numbers of grey seals around our coasts and that common seals are in decline in some areas. Therefore, there may be impacts between different seal species, but we expect them to find a balance.

Peter Peacock: So there is no planned management view on the matter other than the view that the developed approach that has worked in the Moray Firth should be taken when problems arise.

Ian Walker: Absolutely. We are looking at seal management where there are problems with seals' interaction with fisheries or aquaculture and no further than that. Basically, we are looking at a narrow field.

Elaine Murray: I have asked a number of questions in writing about animal welfare concerns—about shooting proficiency and taking seals when they are lactating, for example. The responses that I have received suggest that such matters are still being discussed. Can you give us a timescale for those discussions? Is the intention to lodge an amendment at stage 2 to deal with

those matters, or will they be dealt with in regulations?

Ian Walker: We intend to have discussions over the next year or so on what specifically should be in the licence. We intend that issues and regulations will be dealt with through the licensing process and that things will be specified on the face of each licence. The reason for doing that is that there were concerns about a provision in the 1970 act for a specific type of rifle to be used when a person was shooting seals. We could not easily change that provision, as it was included in the act. We foresee improvements being made and new developments coming in, and we want the licensing system to be as flexible as possible to take such changes on board as soon as they come on stream. We also want non-lethal measures and options to be covered. If such measures and options become more effective and practical, we want to shift over to using them. The deliberate intention is not to have too much specified in the bill, but to make changes on the face of the licence so that we can adapt it over time.

Elaine Murray: Will secondary legislation to Parliament specify that information or will it just be on the licence?

Ian Walker: Each licence that the Scottish Government issues will specify the methods that are to be used for killing, the procedures that are to be followed and so on. If a code of practice is in operation, the licence will say that people should follow it, for example.

Elaine Murray: Such matters will not be subject to parliamentary scrutiny.

Ian Walker: No; it is not our intention that they will be.

Elaine Murray: I understand that a review of species protection is under way, although that is not because of the consequences, or lack of them, of the 1970 act, which the bill will repeal. Do you envisage that a more general review of species protection would have an impact on what the bill will do on seals?

Ian Walker: Possibly. The bill provides for increased penalties for offences under it, which will bring the position into line with that in other wildlife legislation, such as the Wildlife and Countryside Act 1981 and the habitats regulations. If how seriously wildlife crime is treated were changed and the penalties for that were increased, we might want to look at some issues again. However, seals are a case on their own for the moment. In the bill, we have done our best to improve the measures. If other developments came to light, we might want to consider them.

Bill Wilson: I am not sure whether I caught you correctly earlier. Did you say that a trial is taking place in the Solway—

Peter Peacock: It is in the Moray Firth.

Bill Wilson: I am sorry—Alasdair Morgan coughed at an unfortunate time. You said that a trial was taking place in the Moray Firth and you related marksmanship to licences. Does that mean that you are considering saying that a person must reach a certain marksmanship level before a licence will be issued to them?

Ian Walker: We are examining the possibility of training courses, which people would have to undertake before they received permission under a licence.

The Convener: We move on to parts 6 and 7, which will be discussed together.

David Palmer: Part 6 provides for a set of common enforcement powers for the area from 12 to 200 nautical miles. As part of the agreement on additional executive devolution of planning and conservation, we will receive a set of common enforcement powers. The part reflects those powers for the area from 12 to 200 nautical miles, so that the enforcement system for planning and conservation is wholly consistent from zero to 200 nautical miles. The part lists powers of entry, search and seizure and the duties on marine enforcement officers to provide evidence about who they are and so on.

Part 7 contains general provisions. As members might expect, it deals with Crown application, bodies corporate, commencement and consequential modifications.

Elaine Murray: My question is specific to some parts of Scotland. The Solway Firth Partnership has worked across the boundary between England and Scotland. The partnership would like the Solway to have one single marine planning authority but, after the bills have gone through the Westminster and Scottish Parliaments, the legislation that applies to Scottish and English waters could be different. What consideration has been given to areas such as the Solway, where co-ordinated planning is needed across the border between England and Scotland? How will that be dealt with?

David Palmer: What you say is right. We are comfortable that the marine regions and the planning powers that are delegated to them will ensure that the Solway Firth Partnership can progress its plan. The intention of the Department for Environment, Food and Rural Affairs and English ministers is to empower their marine management organisation to interact on the Solway, which it is hoped will allow a consistent plan to be pulled together.

The MMO has been formally constituted, but I am not sure whether it will exist until the Marine and Coastal Access Bill receives royal assent some time this year. It is difficult to be clear about what the organisation is intended to do in such situations. However, English ministers certainly expect the MMO there to have an interface with whatever is created in the Solway region.

The Convener: We move on to what is not in the bill. Concern has been expressed that Marine Scotland has been structured as part of the Government. When we visited the Fisheries Research Services, we were told about scientific research that is being conducted that will support delivery of the bill's provisions. What safeguards will be introduced to prevent a conflict of interest between the different functions of Marine Scotland? Are there tensions between its being part of the Government and its undertaking and disseminating independent scientific research?

Linda Rosborough: It is recognised that there is a need to ensure the continued integrity and independence of the scientific process, so a science advisory board will be set up with the specific purpose of overseeing the process. The board will involve key scientific people and provide the external world with assurance about the nature of the scientific work that is done in Marine Scotland. In addition, a forum bringing together stakeholders from the wider marine family will be set up, to ensure co-ordination and to allow stakeholders to engage at a strategic level with Marine Scotland on its work.

There will be a structural and organisational separation of the duty of enforcement, to ensure that decisions are taken properly and without undue influence, as has been the case until now.

More broadly, the structure that will be put in place, which will involve considerable local engagement with Marine Scotland and its work, will provide for a fair amount of engagement across Scotland with work on the marine environment. That will provide a strong sense of ownership of, engagement with and involvement in what is done in the marine world.

Peter Peacock: Earlier, you described the faith that you are placing in marine planning partnerships. Has thought been given to would happen if one of the partnerships became dysfunctional and did not operate or perform at anything like the level that is expected—which is not inconceivable? Does the bill make provision for ministers to intervene and to restart the process? What would happen in such situations?

David Palmer: To ensure that planning continued, we could withdraw the delegation and return regional planning to the centre. We would probably want to have a period of reflection, to learn lessons from the experience, but we would then seek to reconstitute the partnership by nominating people for appointment to it.

Peter Peacock: I can see that ministers have the power to withdraw delegation, but do they have the power to nominate partnership members?

David Palmer: Yes.

The Convener: Why was a biodiversity duty on all public bodies exercising functions in the offshore area not included in the bill?

12:15

Linda Rosborough: The bill does not go beyond 12 nautical miles as far as nature conservation responsibilities are concerned, because that is outwith the powers of the Scottish Parliament. The UK Marine and Coastal Access Bill includes provisions in relation to nature conservation in the offshore zone. There has been some discussion on the issue recently in the House of Lords and UK ministers have said that it would be within the power of Scottish ministers, as part of the marine planning function that is proposed in the bill, to bring in biodiversity objectives for the offshore zone. Essentially, it is a matter for the Westminster Parliament rather than this Parliament.

The Convener: Okay.

As no one has any more questions, I thank the officials very much for giving evidence and ask them to forward to the clerks any supplementary written evidence that they might wish to provide.

We will have a short suspension to consider some new material on the Climate Change (Scotland) Bill and to have a comfort break.

12:16

Meeting suspended.

12:24

On resuming—

Climate Change (Scotland) Bill

The Convener: Item 6 is consideration of whether, as a committee, we wish to take any collective action at stage 2 of the Climate Change (Scotland) Bill, such as lodging committee amendments that are based on the conclusions and recommendations that are contained in our report on the bill, which are reproduced in the annex to paper 11.

The Government's amendments on part 5 of the bill, which is the part that contains sections on forestry, muirburn and waste reduction and recycling, were published in this morning's *Business Bulletin* and have been provided to members. Perhaps I should go through them quickly.

The clerks have been very busy and have reviewed the Government's amendments on part 5. Amendment 151 seeks to ensure that changes to the dates for muirburn cannot have the effect of making the length of time available for muirburn shorter. Amendment 152 would change the nature of the instrument that would introduce such changes from negative to affirmative.

There are no Government amendments to the forestry provisions. The Government sought to amend the bill to remove the provision that could enable leasing but, as Jim Hume had already lodged an identical amendment, it is anticipated that his amendment will receive Government support.

On waste reduction and recycling, a number of Government amendments have been lodged that would establish a new body to co-ordinate and perform a clearing-house function for deposit and return schemes. Those amendments were detailed to the committee by the cabinet secretary in oral and written evidence during stage 1 scrutiny.

The Government has not lodged amendments that would make secondary legislation based on the broad enabling provisions on waste, which would currently be subject to affirmative procedure, subject to the super-affirmative procedure. In the section of its report on parliamentary scrutiny, the committee recommended that secondary legislation that stemmed from broad enabling powers, including any such legislation on waste, should be subject to the super-affirmative procedure. The super-affirmative procedure allows the relevant committee the opportunity to scrutinise an instrument in draft form and to propose changes to it before it is formally laid before Parliament. The committee has the option of lodging committee amendments that would make secondary legislation on waste subject to the super-affirmative procedure.

I invite members' views.

Alasdair Morgan: On the use of the super-affirmative procedure, I would be happy for such an amendment to be drafted and for it to be approved and lodged by the convener on behalf of the committee.

Bill Wilson: That seems reasonable.

Peter Peacock: I agree with that.

The Convener: As the Conservative and Liberal members are not here at the moment, I will consult them before proceeding.

Peter Peacock: If, for some reason, you decide that that cannot be done, will you inform us so that someone else could lodge such an amendment?

The Convener: Absolutely.

I think that we agree that it would be better if the amendment that Elaine Murray has brought forward were lodged by an individual MSP.

That concludes the public part of the meeting. I thank everyone for their attendance.

12:27

Meeting continued in private until 12:29.

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