

Rural Affairs, Islands and Natural Environment Committee

3rd Meeting, 2022 (Session 6), Wednesday, 26 January

Subordinate legislation

1. This paper supports the Committee's consideration of the following subordinate legislation—
 - The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (SSI 2021/463);
 - The Conservation of Salmon (Scotland) Amendment Regulations 2021 (SSI 2021/466); and
 - The Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493).
2. All SSIs are subject to the negative parliamentary procedure. Further information about this procedure is set out in paragraphs 18 and 19.

The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (SSI 2021/463)

3. The purpose of this instrument is to revoke and replace the Red Rocks and Longay Urgent Marine Conservation Order 2021, made on 10 March 2021 under the Marine (Scotland) Act 2010. The 2021 Order established the Red Rocks and Longay marine protection area (MPA) in order to protect and conserve flapper skate following the discovery of flapper skate eggs in the Inner Sound of Skye. Further information is set out in the policy note, provided at **Annexe A**.
4. This (No. 2 2021) Order extends the Red Rocks and Longay MPA to provide "emergency protection to nationally important flapper skate egg laying habitat" discovered outside the existing MPA. The policy note states that, "due to the high number of eggs being found and the vulnerability of the egg laying habitat, NatureScot has advised the boundary be extended in the interim to afford protection to the eggs discovered outside the original MPA boundary until permanent designation and measures are consulted on and put in place". This Order will remain in force until the end of 16 March 2022.
5. Both the 2021 Order and this (No. 2 2021) Order have been 'urgently made'. Under the terms of the Marine (Scotland) Act 2010, 'urgently made' orders must be made permanent within two years and following stakeholder consultation. The eggs outside the existing MPA were discovered as part of the research and survey work being undertaken to support the scientific case for making the MPA permanent.

6. The SSI was made at 10.20 am and laid at 3 pm on 9 December 2021. The SSI came into effect on 16 December 2021. The Scottish Government has, therefore, breached the 28-day rule which requires that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. In these circumstances, the Scottish Government must write to the Presiding Officer setting out the reasons for the breach. The Scottish Government's letter is provided at **Annexe B**.
7. The Delegated Powers and Law Reform Committee (DPLRC) considered this instrument at its meeting on 21 December 2021. The Committee agreed to draw the instrument to the attention of the Parliament on the basis of the breach of the 28-day rule. The Committee concluded, however, that it was "nevertheless content with the explanation provided by the Scottish Government for failure to comply".¹
8. Members may wish to be aware that the Scottish Government intends to lay a further SSI in relation to the Red Rocks and Longay MPA next month. The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (Urgent Continuation) Order 2022 is required to extend this (No. 2 2021) Order for another 12 months to ensure the continued protection of flapper skate eggs within the site whilst the public consultation to make a permanent MPA is undertaken.

The Conservation of Salmon (Scotland) Amendment Regulations 2021 (SSI 2021/466)

9. The purpose of this instrument is to amend the Conservation of Salmon (Scotland) Regulations 2016. These Regulations make provision to ensure that the killing of Atlantic salmon in Scotland is managed by assessing and categorising specified areas of inland water in relation to their conservation status. Further information is set out in the policy note, provided at **Annexe C**.
10. The 2016 Regulations are updated on an annual basis to reflect the most recent stock assessment; these Regulations would apply for the 2022 fishing season.
11. The SSI was laid on 10 December 2021 and is due to come into effect on 1 April 2022.
12. The DPLRC considered this instrument at its meeting on 21 December 2021 and agreed it did not have any points or comments to draw to members' attention.

¹ Delegated Powers and Law Reform Committee, 23rd Report 2021, paragraphs 12 to 16 and available at: [Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 21 December 2021 | Scottish Parliament](#)

The Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493)

13. The purpose of this instrument is to—

- Appoint 30 June 2022 as the end date for the transitional staging period in all cases;
- Require pre-notification of the import of animal by-products from 1 January 2022, which are not already subject to pre-notification requirements;
- Exempt products of animal origin and other objects intended for personal consumption or use forming passengers' personal luggage and not for sale on the market from prior notification requirements; and
- Postpone the requirements for phytosanitary certificates for certain plants, plant products and other objects to 30 June 2022.

14. Further information is set out in the policy note, provided at **Annexe D**. The policy note states that further legislation is planned in early 2022 to set out specific requirements applying from 1 July 2022.

15. The SSI was laid on 22 December 2021 and came into effect on 1 January 2022. The Scottish Government has, therefore, breached the 28-day rule which requires that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. In these circumstances, the Scottish Government must write to the Presiding Officer setting out the reasons for the breach. The Scottish Government's letter is provided at **Annexe E**.

16. In her letter, the Cabinet Secretary states the original intention was to make these provisions via a UK SI – the Official Controls (Extension of Transitional Periods) (Amendment) (No.2) Regulations – which the Committee was due to consider on 15 December. The Cabinet Secretary [notified](#) the Committee about this UK SI on 6 December and wrote again to [withdraw](#) the notification on 15 December.

17. The Cabinet Secretary states the reason why the provisions were not made via a UK SI, thus requiring an SSI to be drafted at short notice and breaching the 28-day rule, was because—

“since the terms of the original notification were submitted, the UK Government decided on 10 December 2021 - without any engagement with Scottish Ministers whatsoever – to make a number of significant changes to border policy due to come into force from the 1 January 2022. This fundamentally changed the terms of the instrument and is yet further evidence of the wholly unsatisfactory way in which the UK Government continues to approach development and implementation of legislation needed to ensure that there is an appropriate border operating model after EU exit.

Against this background the Scottish Government could no longer consent to the Secretary of State legislating in relation to Scotland for these changes and I indicated to the Committee on 15 December 2021 that the notification that was submitted on 6 December 2021 was to be withdrawn.

18. The DPLRC considered this instrument at its meeting on 18 January 2022. The Committee agreed to draw the instrument to the attention of the Parliament on the basis of the breach of the 28-day rule. The Committee concluded it was “unable to take a view on whether or not it is content with the explanation provided by the Scottish Government for failure to comply with the laying requirements”.²

Parliamentary procedure – negative instruments

19. The negative parliamentary procedure is set out in Chapter 10 of the Parliament’s Standing Orders. Instruments subject to the negative procedure come into force on a specified date and remain in force unless it is annulled by the Parliament. Thus, the Parliament does not need to agree to the instrument in order for it to come into force.

20. The Parliament may, however, and on the recommendation of the lead committee, recommend the instrument be annulled within 40 days of the instrument being laid. Any MSP may by motion propose to the lead committee that the committee recommends “that nothing further is to be done under the instrument”. Any motion for annulment would be debated by the lead committee and a report made to Parliament.

For decision

21. The Committee is invited to note the instruments.

**Rural Affairs, Islands and Natural Environment Committee clerks
January 2022**

² Delegated Powers and Law Reform Committee, 2nd Report 2022, paragraphs 39 to 43 and available at: [Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 18 January 2022 \(azureedge.net\)](https://www.azureedge.net/subordinate-legislation-considered-by-the-delegated-powers-and-law-reform-committee-on-18-january-2022)

Policy note

The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021

SSI 2021/463

1. The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (“the Order”) is made by the Scottish Ministers in exercise of the powers conferred by sections 85(1)(a), (2) and (4), 86(1) and (3), 92(1) and 93(1) of the Marine (Scotland) Act 2010 (“the Act”) and all other powers enabling them to do so.

Policy objectives

2. The purpose of this instrument is to revoke and replace the Red Rocks and Longay Urgent Marine Conservation Order 2021 (SSI 2021/131). This is due to the boundary of the Red Rocks and Longay Marine Protected Area (MPA) having been extended affording emergency protection to nationally important flapper skate egg laying habitat discovered outside the original MPA following further scientific research surveys. This is in furtherance of the conservation objectives of the Red Rocks and Longay Marine Protected Area (“the MPA”). The designation of the extended MPA takes effect on the 16 December 2021.

Policy background

3. Flapper skate (*Dipturus intermedius*) was historically abundant in the North-east Atlantic and widely distributed in the seas surrounding the British Isles. However its range has reduced significantly and catch rates declined throughout the 20th century. It now only occurs in the northern North Sea and off Scotland’s north-west coast. Part of the common skate complex (along with blue skate), flapper skate is on the OSPAR Threatened and/or Declining Species and Habitats List and the list of Priority Marine Features.

4. The Red Rocks and Longay urgent MPA was first designated on 10 March 2021, following provision of advice from NatureScot regarding the discovery of flapper skate eggs in the Inner Sound of Skye. This urgent site can be in place for up to 2 years, and stakeholder consultation is required before the site can be made permanent. An urgent Marine Conservation Order (MCO) was made on 10th March 2021 to further the conservation objectives within the Red Rocks and Longay MPA.

5. Further surveys, carried out as part of the work to ensure there is sufficient evidence to support the scientific case for making the MPA permanent, has discovered flapper skate egg laying habitat outside the current site boundary with an estimated 725 eggs being observed.

6. Due to the high number of eggs being found and the vulnerability of the egg laying habitat, NatureScot has advised the boundary be extended in the interim to

afford protection to the eggs discovered outside the original MPA boundary until permanent designation and measures are consulted on and put in place.

7. According to section 3 of the Act, the Scottish Ministers must act in a way best calculated to further the achievement of sustainable development, including the improvement of the health of the Scottish Marine Area, when exercising any function that affects that Area under the Act.

8. Having identified further nationally important egg-laying habitat for flapper skate outside the original Red Rocks and Longay MPA, Scottish Ministers determined there was a need to include this egg laying habitat in the protection given by the MPA by extending the site boundary in the interim, and therefore improving the health of our seas. The extended site comprises the site of the original MPA and the newly identified-egg laying habitat, an addition of approximately 5.9 square kilometres to the MPA. This Order revokes and replaces The Red Rocks and Longay Urgent Marine Conservation Order 2021 to make reference to the MPA as designated under the new designation order instead of the original order, to further the conservation objectives of the MPA.

9. This Order restricts activities which may adversely affect the area in the same manner as the original urgent MCO, including all bottom contacting fishing gear, sea angling, aquaculture, anchorages & moorings, deposits on the seabed, recreational & commercial diving and marine infrastructure within the MPA.

10. This Order is being made on an urgent basis, under section 88 of the Act, due to the urgent need to put measures in place to protect flapper skate from impacts in the marine environment in the area outside the current MPA.

Consultation

11. As there is an urgent need to protect the flapper skate no public consultation has taken place on this Order. Section 88 of Act allows the Scottish Ministers to dispense with consultation when there is an urgent need to act. However, officials have undertaken targeted engagement with affected sectors and the Scottish Ministers have taken account of advice from NatureScot.

12. Public consultation on permanent management measures and site designation will be taking place before Scottish Ministers determine whether the site merits designation as a permanent MPA. The consultation is due to begin in early February 2022.

Impact assessments

13. A Business and Regulatory Impact Assessment (BRIA) and Island Communities Impact Assessment (ICIA) have not been carried out for this Order due to its urgent nature.

Scottish Government
Directorate for Marine Scotland
09 December 2021

Letter to the Presiding Officer from the Scottish Government, dated 9 December 2021

The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021, SSI 2021/463 was made by the Scottish Ministers under sections sections 85(1)(a), (2) and (4), 86(1) and (3), 92(1) and 93(1) of the Marine (Scotland) Act 2010 (“the 2010 Act”) on 09 December 2021. It is being laid before the Scottish Parliament today and will come into force on 16 December 2021.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

Under section 3 of the 2010 Act, when exercising any function under the Act that affects the Scottish marine area the Scottish Ministers and public authorities must act in the way best calculated to further the achievement of sustainable development, including the protection and, where appropriate, the enhancement of the health of the area. Scottish Ministers consider that this Marine Conservation Order (MCO), made on an urgent basis, is necessary to further the conservation objectives, namely to conserve flapper skate, within the extended Red Rocks and Longay Marine Protected Area (MPA).

Flapper skate, along with blue skate, make up the common skate complex and are on the OSPAR Threatened and/or Declining Species and Habitats List and the list of Priority Marine Features. Furthermore they are considered ‘Critically Endangered’ globally and in European waters by the International Union for Conservation of Nature (IUCN). Little is known about the breeding habits of flapper skate due to their rarity, however it is thought their eggs take around 18 months to hatch and are sensitive to disturbance from a number of marine activities.

The Red Rocks and Longay MPA was first designated urgently on 10 March 2021, following provision of advice from NatureScot regarding the discovery of flapper skate eggs in the Inner Sound of Skye. This urgent site can be in place for up to 2 years, and stakeholder consultation is required before the site can be made permanent. An urgent MCO was made on 10th March 2021 to further the conservation objectives within the Red Rocks and Longay MPA.

Further surveys as part of the work to ensure there is sufficient evidence to support the scientific case for making the MPA permanent has discovered flapper skate egg laying habitat outside the original site boundary with an estimated 725 eggs being observed.

Due to the high number of eggs being observed and the vulnerability of the egg laying habitat NatureScot has advised the site boundary should be extended in the interim as soon as possible. Scottish Ministers have therefore taken the decision to extend the original site boundary by urgently re-designating the extended site as a Marine Protected Area, and applying interim measures to the extended area from that date by The Red Rocks and Longay Urgent Marine Conservation (No. 2) Order

2021 which revokes and replaces The Red Rocks and Longay Urgent Marine Conservation Order 2021. This is to make reference to the MPA as designated under the new designation order instead of the original order.

This is of an urgent nature as this is the first flapper skate nursery area of this scale to be identified in Scotland and is of national importance for conservation of this species. This new Urgent MCO restricts activities which may adversely affect the area in the same manner as the original urgent MCO including all bottom contacting fishing gear, sea angling, aquaculture, anchorages & moorings, deposits on the seabed, recreational & commercial diving and marine infrastructure within the MPA. These measures will apply to the larger, extended site from 16 December 2021. This would provide protection whilst proposals are drafted for permanent protection measures.

Where the Scottish Ministers consider that there is an urgent need to protect an area in respect of which a Marine Conservation Order may be made then section 88 of the Act allows the Ministers to make a Marine Conservation Order on an urgent basis. In such cases the procedure set down for prior consultation under section 87 of the Act does not apply.

As the disturbance or removal of flapper skate eggs presents a significant risk of the conservation objective in respect of flapper skate not being achieved there is a legal duty on the Scottish Ministers to intervene as soon as possible. Therefore, we have not been able to follow the procedure at section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 on this occasion. Our reasoning for not doing so is to remove the risk of further impacts on the flapper skate nursery area as soon as possible.

We will endeavour to follow the procedure at section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 for other MPA management proposals.

Mathew Leslie
Marine Biodiversity Policy Officer
Marine Planning and Policy – Marine Scotland

Policy note

The Conservation of Salmon (Scotland) Amendment Regulations 2021

SSI 2021/466

Policy objectives

1. Atlantic salmon is a protected species under the EU Habitats Directive. Following the UK's withdrawal from the European Union, the Scottish Government is committed to continuing, to the greatest extent possible, to follow the principles and policies set out in the Directive; and will maintain, and where possible, exceed, relevant EU standards relating to the conservation and management of salmon.
2. In addition, the North Atlantic Salmon Conservation Organisation (NASCO)³ provides guidance that makes it clear that fisheries are best managed on a single river stock basis and that action should be taken to reduce the risks posed by any Mixed Stock Fisheries (those fisheries exploiting salmon from more than one river). Salmon continue to face many pressures in the marine and freshwater environment and there is an ongoing need to ensure and to demonstrate that any killing of wild salmon in Scottish waters is sustainable. In addition, greater protection and, where appropriate, enhancement of stocks will help to maximise the socio-economic benefits that flow from them.
3. The Conservation of Salmon (Scotland) Amendment Regulations 2021 amend the Conservation of Salmon (Scotland) Regulations 2016 ('the 2016 Regulations') which make provision for the conservation of salmon in Scotland. The purpose of the 2016 Regulations is to ensure that the killing of Atlantic salmon in Scotland is managed by assessing and categorising specified areas of inland water in relation to their conservation status. The 2016 Regulations prohibit the retention of Atlantic salmon caught in any coastal waters in a salmon fishery district and in specified areas of inland waters. In addition, Ministers may agree a conservation plan with the local district salmon fishery board or salmon fishery proprietors, particularly in Special Areas of Conservation (SACs) where stocks have been identified as being in poor conservation status.
4. The 2016 Regulations placed a statutory duty on the Scottish Ministers to carry out an assessment of the stock levels for salmon in inland waters for the purposes of

³ The Convention for the Conservation of Salmon in the North Atlantic Ocean is a multilateral agreement which came into force on 1st October 1983. Its aim is to promote the conservation, restoration, enhancement and rational management of salmon stocks in the North Atlantic through international co-operation. One of the measures in the Convention is the prohibition of fishing for salmon outwith the 12 mile zone in coastal States (article 2.2). It also makes general provision regarding the availability, and sharing, of statistics for catch as well as stocks and the provision of scientific data. NASCO, the North Atlantic Salmon Conservation Organisation, is the international organisation established by the Convention. Following the UK's withdrawal from the European Union the UK is now a full party to the Convention, having previously been represented through the EU.

establishing the conservation status of salmon in defined areas. This assessment is carried out annually. Where an area of inland waters includes a SAC, the Scottish Ministers must have regard to the conservation objectives of the SAC when carrying out their assessment. The purpose of the assessment is to determine whether fishing is sustainable in the area in question. The assessment process entails the collation of information on population levels of salmon in each assessment area based on rod catch statistics and other data including information from in-river fish counters.

5. Since the introduction of the 2016 Regulations, Marine Scotland has engaged with the sector to develop and improve the annual conservation assessment process and the robustness of the data used in the assessment. Following scrutiny of the Regulations in 2018 by the Scottish Parliament's Environment, Climate Change and Land Reform Committee, the Scottish Government agreed that no significant changes would be made to the underlying assessment model for a period of three years, to provide stability and certainty to the sector. Each annual assessment is, however, based on the most recently available data from submitted catch returns and the fish counter network.

Legislative context

6. Section 38(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 ('the 2003 Act') enables the Scottish Ministers to make regulations considered necessary or expedient for the conservation of salmon. The Conservation of Salmon (Scotland) Regulations 2016 were made in February 2016 and came into force on 31 March 2016. Subsequent Amendment Regulations, reflecting developments in the assessment process and the outcomes of the annual assessment, came into force on 1 April in each year since 2016. The purpose of the current Regulations is to amend the 2016 Regulations to reflect the most recent stock assessment for the 2022 fishing season.

The Regulations

7. The Conservation of Salmon (Scotland) Amendment Regulations 2021 amend the 2016 Regulations. Regulation 2 amends the 2016 Regulations by substituting schedule 2 of the 2016 Regulations. Schedule 2 describes the areas of inland waters where there is a prohibition on the retention of any salmon caught.

Consultation

8. In accordance with paragraphs 10 and 11 of schedule 1 of the 2003 Act, the Scottish Ministers have consulted with such persons they considered appropriate and have given notice of the general effect of their proposals by way of an advertisement in three national newspapers. The consultation period ran from 11 August to 10 September 2021.
9. A total of 18 written representations were received from individuals and organisations including angling clubs, district salmon fishery boards (DSFBs) and fishery owners. These covered a range of issues, including questioning the

assessment approach and methodology. Several of those responding have made similar representations in previous years. Recurring issues or themes raised in the comments also included a number of people commenting on issues relating to the accuracy or otherwise of catch returns submitted by anglers, predation by seals or piscivorous birds or to wider pressures impacting salmon stocks including climate change. Each of the representations has been considered in finalising the draft Amendment Regulations and Marine Scotland has responded to each of the submissions received.

10. As a result of the representations received, two proposed gradings were raised from Grade 2 to Grade 1, for the Rivers Ness and Moriston, although those changes did not affect the Regulations as proposed.
11. A small number of stakeholders raised the issue of how the Covid-19 pandemic impacted fishing, particularly during the early part of the 2020 fishing season when fishing in inland waters was prohibited. In carrying out the latest conservation status assessment the Scottish Government has considered these potential impacts and has adjusted the assessment calculation for each assessment area individually. A detailed paper setting out the methodology adopted was published as part of the public consultation on the proposed river gradings for 2022.
12. A submission was also received from the Salmon Net Fishing Association of Scotland (SNFAS) seeking a review, and annual reassessment, of the current prohibition on the retention of salmon caught in coastal waters, as set out in regulation 3(1) of the 2016 Regulations. Given the continuing downward trend in the number of salmon returning to Scotland's waters, and the commitment to reduce the risks posed by mixed stock fisheries, the Scottish Government does not propose to lift this prohibition, and no amendment to regulation 3(1) is sought. Marine Scotland will continue to engage with SNFAS on this issue going forward.

Impact and financial effects

13. A Business and Regulatory Impact Assessment (BRIA) has been prepared for these Regulations.

Marine Scotland
December 2021

Policy note

The Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021

SSI 2021/493

The above instrument is made in exercise of the powers conferred by Article 144(6) of, and paragraph 2 of Annex 6 to, Regulation (EU) 2017/625 of the European Parliament and of the Council on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products⁴, paragraph 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018⁵ and of all other powers enabling them to do so.

The instrument is subject to negative procedure.

Purpose of the instrument

To make amendments to the end date of the transitional staging period and in respect of notification requirements to come into force for 1 January 2022.

This instrument replaces the dates for the ending of the transitional staging period, as set out in the Official Controls (Extension of Transitional Periods) Regulations 2021 with a single date – 30 June 2022 – so that the Official Controls Regulation will apply to all SPS goods starting from 1 July 2022. Further legislation is planned in early 2022 to set out specific requirements applying from 1 July 2022.

The instrument extends from 1 January 2021 to the end of the transitional staging period transitional provision on requirements for phytosanitary certificates in regulation 52 of the Plant Health (Amendment etc.) (EU Exit) Regulations 2020⁶.

Policy objectives

The EU (Withdrawal) Act 2018 (EUWA) converted and preserved EU law at the end of the Transition Period into domestic law (retained EU law). It also provided for amendments to be made to address deficiencies arising from EU exit.

Those amendments included the introduction of a 'transitional staging period' for goods entering Great Britain from the EU and certain other countries. Provision was

⁴ EUR 2017/625. Article 144 was substituted, and Annex 6 inserted, by S.I. 2020/1481. The Scottish Ministers are the appropriate authority in relation to Scotland by virtue of Article 3(2A)(c).

⁵ 2018 c. 16; paragraph 21 of schedule 7 was amended by paragraph 53 of schedule 5 of the European Union (Withdrawal Agreement) Act 2020

⁶ S.I. 2020/1482

made for the end date of the transitional staging period to be changed by statutory instrument, and this instrument is made in exercise of those powers, namely Article 144(6) of, and paragraph 2 of Annex 6 to, the Official Controls Regulation.

Statutory instruments and Scottish statutory instruments made and brought into force in late 2020 gave effect to the UK Government's decision to introduce checks on EU SPS imports in phases during this transitional staging period. These included amendments to regulations governing official controls, trade in animals and related products, and plant health which provided for phased requirements for pre-notification, health and phytosanitary certification and documentary checks on imports of EU and EEA products of animal origin ("POAO"), animal by-products ("ABP"), plants, plant products and other objects. The dates for the end of the transitional staging period and the phased introduction of requirements within it have been amended previously by the Trade and Official Controls (Transitional Arrangements for Prior Notifications) (Amendment) Regulations 2021⁷, the Official Controls (Extension of Transitional Periods) Regulations 2021⁸, the Animal Health, Plant Health, Seeds and Seed Potatoes (Miscellaneous Amendments) Regulations 2021⁹, the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) Regulations 2021¹⁰, the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 2) Regulations 2021¹¹ and the Animal Products (Transitional Import Conditions) (Miscellaneous Amendment) (Scotland) Regulations 2021¹².

On 14 September 2021, the UK Government announced its decision to revise the current timetable for the introduction of all remaining checks. Without this instrument, from 28 February 2022, businesses in GB importing animals, POAO, ABP and plants, plant products and other objects from the EU and EU businesses exporting to GB will be obliged to comply with documentary, physical and identity checks at Border Control Posts. Additionally, documentary checks and phytosanitary certificates would be required for all regulated plants and plant products from 1 January 2022.

This instrument therefore enables the continued functioning of SPS controls between the EU and Scotland and the EU following the end of the transitional staging period. **The end of the transitional staging period is amended to 30 June 2022, after which Official Controls Regulation checks will apply to SPS goods entering GB from the EU.**

Requirements for the pre-notification of the import of ABP not currently subject to prenotification requirements are introduced from 1 January 2022, and provision is made to ensure that goods which form part of passengers' personal luggage and intended for personal consumption or use, and small consignments of goods sent to natural persons and not intended to be placed on the market are not subject to pre-notification requirements which apply from 1 January 2022.

⁷ S.I. 2021/429

⁸ S.I. 2021/809

⁹ S.I. 2021/1229

¹⁰ S.S.I. 2021/297

¹¹ S.S.I. 2021/342

¹² S.S.I. 2021/432

Explanation of the law being amended by the regulations

The law being amended by the regulations is:

- Regulation 2 of the Official Controls (Extension of Transitional Periods) Regulations 2021 which appoints the end date of the “transitional staging period” in paragraph 2 of Annex 6 to Regulation (EU) 2017/265 as the 31 December 2021 in respect of documentary checks for plants, plant products and other objects, and 28 February 2022 in all other cases.
- Paragraph 4 of schedule 5 of the Trade in Animals and Related Products (Scotland) Regulations 2012, which makes provision derogating from the provisions of Part 3 of those Regulations (which apply in relation to the importation into Scotland from a third country of animals or products subject to official controls at border control posts), requiring instead the prior notification of the import of animals and certain animal products.
- Paragraph 13 of Annex 6 to Regulation (EU) 2017/625 which creates requirements for the prior notification of entry to Great Britain for certain goods from certain third countries to apply from 1 January 2022.
- Regulation 52 of the Plant Health (Amendment etc.) (EU Exit) Regulations 2020, makes transitional provision dis-applying requirements for phytosanitary certificates for certain plants, plant products and other objects introduced into Great Britain until 1 January 2022.

Reasons for and effect of the proposed change or changes on retained EU law

These Regulations will provide for official controls on imports currently scheduled to come into force in January and March 2022, to be introduced from 1 July 2022.

Statements required by European Union (Withdrawal) Act 2018

The Regulations are made in exercise of powers conferred by Article 144(6) of, and paragraph 2 of Annex 6 to, Regulation (EU) 2017/625 of the European Parliament and of the Council on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products. In relation to regulations 3 to 5 of the Regulations, they are also made in exercise of the powers in paragraphs 1(1) and (3) of Part 1 of schedule 2 of, and paragraph 21(b) of schedule 7 of, the European Union (Withdrawal) Act 2018. The statements below relate to regulations 3 to 5 in so far as they are made under the European Union (Withdrawal) Act 2018.

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Cabinet Secretary for Rural Affairs and Islands has made the following statement: “In my view the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) Regulations 2021 do no more than is appropriate. This is the

case because the Regulations make only necessary transitional amendments to ensure appropriate arrangements can be put in place for sanitary and phytosanitary checks on animals, animal products, plants, plant products and other objects during the remainder of the transitional staging period.”

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Cabinet Secretary for Rural Affairs and Islands has made the following statement: “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These are necessary to facilitate trade, protect food supply and ensure effective disease prevention, eradication and control as well as for the continued protection of public health”.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Cabinet Secretary for Rural Affairs and Islands has made the following statement: “In my view the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Cabinet Secretary for Rural Affairs and Islands has made the following statement: “In my view the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

The Cabinet Secretary for Rural Affairs and Islands made the following statement: “In my view the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 have had due regard to the guiding principles on the environment and animal welfare as derived from the equivalent principles provided for in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union.”

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

The Cabinet Secretary for Rural Affairs and Islands has made the following statement: “In my view the Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 do not alter current policy on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)”.

An indication of how the regulations should be categorised in relation to the significance of the change proposed

Low - the amendments are solely to make relatively minor amendments to transitional arrangements.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

Negative procedure is considered appropriate as regulations 3 to 5 make amendments to transitional arrangements. It is also considered appropriate because the powers under Article 144(6) of, and paragraph 2 of Annex 6 to, Regulation (EU) 2017/625 to make provision incidental and supplementary to appointing the end date of the transitional staging period (and which the powers under the European Union (Withdrawal) Act 2018 are being exercised together with) are subject to negative procedure. Regulations 3 to 5 do not include provisions which fall within paragraph 1(2) of schedule 7 of the European Union (Withdrawal) Act 2018.

Consultation

Under the enabling powers for this SSI, consultation is required before making new Regulations. Defra undertook a consultation exercise in December 2021 on behalf of Scottish Ministers, summarising the changes to be made by this instrument and inviting comments, in particular on the impact of revising the timeline for phased introduction of SPS checks, and on the potential impact if this instrument were not to be brought into force. The consultation was targeted at key stakeholders in the SPS sector, including representative trade and industry organisations, interest groups and Port Health Authorities. Over 120 organisations and individuals were consulted. At the close of consultation, Defra had received one response, which was supportive of the proposed measures and the swift laying of supportive legislation.

Impact assessments

Full impact assessments have not been prepared for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen. There is expected to be no impact on business, charities or voluntary bodies.

Financial effects

The Cabinet Secretary for Rural Affairs and Islands confirms that no BRIA is necessary, as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Agriculture and Rural Economy Directorate
21 December 2021

Letter to the Presiding Officer from the Scottish Government

The Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No.3) Regulations 2021, were made by the Scottish Ministers under Article 144(6) of, and paragraph 2 of annex 6 to Regulation (EU) 2017/625 and paragraph 1(1) and (3) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union Withdrawal Act 2018 on Tuesday 21 December 2021 and will be laid before the Scottish Parliament on Wednesday 22 December. The Regulations have a coming into force date of 1 January 2022.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with. To meet the requirements of section 31(3) of that Act, this letter provides an explanation.

The policy intent of these Regulations relates to controls on imports to Scotland known collectively as sanitary/phytosanitary measures (SPS) and replaces the dates for the ending of the transitional staging period (TSP), as set out in the Official Controls (Extension of Transitional Periods) Regulations 2021 with a single date – 30 June 2022 – so that the Official Controls Regulation will apply fully to all SPS goods entering Great Britain from 1 July 2022. In particular it is necessary for these Regulations to come into force on 1 January 2022 in order to extend, along with England and Wales, transitional measures which were due to end on that date.

It had been the original intention that these measures would have been incorporated into a UK Statutory Instrument, “the Official Controls (Extension of Transitional Periods) (England and Wales) (Amendment) (No.2) Regulations 2021” that was made on 15 December 2021 and I wrote to the Rural Affairs, Islands and Natural Environment Committee on that basis on 6 December 2021.

However, since the terms of the original notification were submitted, the UK Government decided on 10 December 2021 - without any engagement with Scottish Ministers whatsoever – to make a number of significant changes to border policy due to come into force from the 1 January 2022. This fundamentally changed the terms of the instrument and is yet further evidence of the wholly unsatisfactory way in which the UK Government continues to approach development and implementation of legislation needed to ensure that there is an appropriate border operating model after EU exit.

Against this background the Scottish Government could no longer consent to the Secretary of State legislating in relation to Scotland for these changes and I indicated to the Committee on 15 December 2021 that the notification that was submitted on 6 December 2021 was to be withdrawn. In that letter I outlined to the Committee that this separate Scottish statutory instrument would be forthcoming, thereby giving effect from 1 January 2022 to changes that the Scottish Government considers appropriate.