

Enabling powers for the Environmental Impact Assessment regime and Habitats Regulations in Scotland

Consultation Document

March 2024

Responding to this Consultation

We are inviting responses to this consultation by 13 May 2024.

Please respond to this consultation using the Scottish Government's consultation hub, [Citizen Space](#). Access and respond to this consultation online at <https://consult.gov.scot/environment/eia-and-hra-consultation>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 13 May 2024.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send to:

Email: eiahabsregsconsultation@gov.scot

By post:

EIA and Habitats Regulations Consultation response
Restoration team
Area 1B North
Scottish Government
Victoria Quay
Edinburgh
EH6 6QQ

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

Please see [our privacy policy](#) to find out how we handle your personal data.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public on [our website](#). If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at eiahabregsconsultation@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our [consultations online on our website](#). Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

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



Respondent Information Form and Consultation Questionnaire

Please Note this form **must** be completed and returned with your response.

Please see [our privacy policy](#) to find out how we handle your personal data.

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email Address

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
- No

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

Overview

We are seeking views on proposed enabling powers that would better allow for future amendments to Scotland's EIA regimes and Habitats Regulations. These are key legislative frameworks which underpin environmental protection and assessment processes. The proposed enabling powers would help replace powers lost as a result of the UK's exit from the European Union (EU), and would help ensure the relevant legislation can remain fit for purpose in future.

Why your views matter

Your views will help inform whether we seek new powers to better support future legislative amendments to Scotland's EIA regimes and the Habitats Regulations in Scotland. They will also help inform what limitations should be placed on their purpose or use.

Part 1 - Enabling Power Requirement

Our EIA regimes and the [Conservation \(Natural Habitats, &c.\) Regulations 1994](#) ("the 1994 Habitats Regulations") are key legal frameworks underpinning environmental protection and assessment processes in Scotland, on land and at sea (out to 12 nautical miles (nm)).

The [European Communities Act 1972](#) ("the 1972 Act") provided enabling powers for Scottish Ministers to make and amend legislation for the purpose of implementing EU obligations. The 1994 Habitat Regulations and the EIA regimes were originally made and then subsequently amended using the powers in the 1972 Act. However, following the UK's withdrawal from the EU, the 1972 Act was repealed and these powers have been lost.

There are some existing powers available to Scottish Ministers to amend relevant legislation. These powers can only be exercised for specific, or limited purposes and do not provide the flexibility that may be required in future to ensure the legislation remains fit for purpose. Additionally, some of these available powers are expected to 'sunset' at a given date, meaning they will only be available for a limited time.

We consider it vital that we have the ability to ensure that 1994 Habitats Regulations and the EIA regimes remain fit for purpose over time. The purpose of enabling powers would therefore be to allow for future amendments to the relevant legislation in light of evolving circumstances, or to address existing issues or inefficiencies. This would provide the flexibility to adapt to future requirements, while ensuring these legislative frameworks continue to effectively underpin environmental protection and assessment processes in Scotland.

An additional factor is that the relevant legislation comprises "assimilated law" which is the new name for the law that was retained from the period of the UK's membership of the EU. On 8 February 2024 the Scottish Government sent the first in

a bi-annual series of updates on the [Retained EU Law \(Revocation and Reform\) Act 2023](#). This sets out that whilst Scottish Ministers do not share UK Ministers' deregulatory and divergent agenda for the future treatment of assimilated law, the Scottish Government recognises that there may be particular cases for reforming particular assimilated law. The Scottish Government considers that Scotland's EIA regimes and the 1994 Habitats Regulations are cases where legislative reform may be appropriate in future, and invites views accordingly.

The specifics of any secondary legislation proposed using the powers would also need to be fully assessed against the Scottish Government's EU alignment policy to maintain and advance the high standards we share with the EU.

Part 2 of this consultation sets out information and questions relating to the EIA regimes. Part 3 sets out information and questions relating to the 1994 Habitats Regulations. Part 4 sets out information and questions relating to our approach to impact assessments for these proposals.

Part 2 - Environmental Impact Assessments (EIAs)

What is EIA?

Environmental Impact Assessment (EIA) is a systematic means of assessing the significant effects of a proposed project or development on the environment, seeking mitigation where possible to avoid, reduce or offset adverse effects and ensure that decision makers are aware of these effects before consent can be given.

EIA encompasses a number of stages:

1. Screening – to decide if an EIA is required for certain developments
2. Scoping – to agree what needs to be included in the assessment and outlined in the relevant EIA report
3. Preparing the EIA report – setting out the likely significant environmental effects of the development and any mitigation
4. Submitting an application and holding a consultation – the EIA report and development application must be publicised and interested parties and the public given an opportunity to give their views on it
5. Decision-making – the EIA report and any comments on it must be taken into account by the competent authority before they decide whether to give consent, and a decision notice must be published
6. Post-decision – the developer starts any monitoring required by the competent authority.

Scotland's EIA regimes

In Scotland, the EU EIA Directive was implemented by multiple pieces of legislation covering a range of sectors or licensable purposes. There are also UK EIA regulations that apply in Scotland in some cases, for example in relation to matters

which are reserved to the UK Government (such as oil and gas). The powers we are proposing here only relate to the EIA legislation for which the Scottish Parliament has legislative competence (meaning matters which the Scottish Parliament can make laws about).

Scotland's EIA regimes include:

- Agriculture (including land drainage and irrigation projects)
- Forestry
- Marine licensing
- Planning
- Ports and harbours
- Transports and works projects
- Trunk roads
- Flood management
- Electricity works (however these regulations are not in the scope of the current consultation)

In the majority of cases, Scottish Ministers are the competent authority for EIA decisions, meaning it is their role to determine whether a proposal can proceed. Local authorities are the competent authority in relation to flood management, and for town and country planning matters the competent authority is either the relevant planning authority or the Scottish Ministers as the case may be.

As explained in Part 1, the relevant legislation comprises assimilated law and the Scottish Government considers that this is an area where legislative reform may be appropriate in future.

What are we proposing?

The Scottish Government is seeking views on whether Scottish Ministers should have enabling powers which would better allow future amendments to EIA regimes for which the Scottish Parliament has legislative competence. This would provide the ability to ensure that the regimes remain fit for purpose in future and do not effectively become frozen in time.

A further consideration is that the UK Government has recently introduced new powers, through the Levelling-up and Regeneration Act 2023, which allow for replacement of existing EIA processes with a new system of Environmental Outcome Reports (EOR). The enabling power we are proposing here would provide a mechanism for potential improvements to the existing EIA regimes in Scotland, rather than replacing them with an EOR system.

We are also seeking views on what limitations should be placed on these powers, whilst recognising we cannot fully predict every potential future scenario where such powers could be used. We want to ensure the appropriate balance is achieved between providing flexibility to amend the EIA regimes to make important improvements and/or adapt to future circumstances, whilst ensuring they continue to

effectively underpin environmental protection and assessment processes in Scotland.

It is not possible to predict every circumstance under which the need for an enabling power may arise in future, although some potential scenarios have been identified. Any future use of the powers would be subject to public consultation and the appropriate impact assessments.

Below are some examples of how enabling powers could be used in future.

Scenario A

At the moment some of the EIA regimes state that applicants must send in paper copies of EIA reports. They do not allow them to send the reports by electronic means such as email, meaning hard copies of very large volumes of information have to be produced by applicants and handled by regulators.

An enabling power would allow the Scottish Ministers to update the regulations to allow applicants to send in reports by other means, for example by email or through an online portal.

The reason for using a power in this way would be to enable greater flexibility for applicants and reduce the costs associated with printing and delivering documents. It would also make handling applications less onerous in terms of processing and storing applications.

This is currently provided for by some EIA regimes (e.g. in relation to planning) but not others, for example the Marine Works EIA regime.

Scenario B

At the moment, the Forestry EIA regime allows for enforcement notices to be served on a person carrying out work in connection to a forestry project, where it appears that EIA consent was required, or where the work is carried out in a way that breaches conditions set out when EIA consent was granted.

An enabling power would allow Scottish Ministers to update the regulations to allow for enforcement notices to also be served on landowners/controllers. This would bring forestry EIA enforcement more in line with the Forestry and Land Management (Scotland) Act 2018, where responsibilities lie with the owner of the land as well as the person carrying out work.

The reason for using a power in this way would be to ensure EIA regulations can be effectively enforced if breaches are discovered. In this case, this would be particularly where work has been carried out on land but the persons carrying out the work are no longer present, cannot be identified, or do not have authority to carry out work on the land. Providing the ability to serve an enforcement notice on the landowner would ensure any work required to rectify a breach of conditions would be carried out, regardless of who carried out the initial works.

The following set of questions relate to the EIA regimes, please use the information provided to assist you.

Question 1

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

Legislation that would be covered by the enabling powers

The enabling powers would apply to the following legislation, in relation to EIA only:

- i. [Marine Works \(EIA\) \(Scotland\) Regulations 2017](#)
- ii. [Town and Country Planning \(EIA\) \(Scotland\) Regulations 2017](#)
- iii. [Agriculture, Land Drainage and Irrigation Projects \(EIA\) \(Scotland\) Regulations 2017](#)
- iv. [Forestry \(EIA\) \(Scotland\) Regulations 2017](#)
- v. [Flood Risk Management \(Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts\) \(Scotland\) Regulations 2010](#)
- vi. [Transport and Works \(Scotland\) Act 2007](#) (in relation to EIA only)
- vii. [Transport and Works \(Scotland\) Act 2007 \(Applications and Objections Procedure\) Rules 2007](#) (in relation to EIA only)
- viii. [Roads \(Scotland\) Act 1984](#) (in relation to EIA only)
- ix. Schedule 3 of the [Harbours Act 1964](#) (in relation to EIA only)

Note: The proposed enabling powers would not cover the [Electricity Works \(Environmental Impact Assessment\) \(Scotland\) Regulations 2017](#). Given that electricity generation is a reserved matter, an enabling power for these regulations needs to be transferred separately by the UK Government, which was done previously prior to EU Exit. The UK Government made a commitment to delivering this via a Scotland Act Order before the end of the current UK Parliament during the passage of the Levelling-up and Regeneration Act 2023.

- Yes
- No
- Unsure
- Other – Please explain

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

Question 2

Do you agree there should be limitations on how Scottish Ministers can use the enabling powers being sought to better allow amendments to the EIA regimes?

- Yes
- No
- Unsure
- Other – Please explain

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

Question 3

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

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

Part 3 - The 1994 Habitat Regulations

The Conservation (Natural Habitats, &c.) Regulations 1994

The [1994 Habitats Regulations](#) are the main piece of legislation which transpose the requirements of the [EU Habitats Directive](#) and elements of the [EU Birds Directive](#) in Scotland, on land and in territorial waters (0-12nm from the coast). Separate versions of the legislation apply in England and Wales and to certain reserved matters on land and in territorial waters (the [Conservation of Habitats and Species Regulations 2017](#)), and to Scottish offshore waters (beyond 12nm from the coast) (the [Conservation of Offshore Marine Habitats and Species Regulations 2017](#)). Only the 1994 Habitats Regulations would be covered by the proposed enabling power.

The 1994 Habitats Regulations establish a general duty on Scottish Ministers, competent authorities and statutory advisors to exercise their functions so as to secure compliance with the requirements of the EU Habitats and Wild Birds Directives. The Regulations also set out provisions relating to the designation and management of protected areas which are important for certain natural habitat types (Special Areas of Conservation – SACs) and bird species (Special Protection Areas - SPAs). These sites are collectively referred to as “European sites” or “European marine sites”, and form part of a UK site network. This includes procedural requirements in relation to the assessment of implications of plans or projects for these sites, and for how negative impacts should be managed and compensated for if there are imperative reasons why a plan or project should go ahead even if it will have an adverse impact on site integrity. Finally, the 1994 Habitat Regulations set out protections and licensing rules for certain species of animals and plants.

As explained in Part 1, the 1994 Habitats Regulations are assimilated law and the Scottish Government considers that this is an area where legislative reform may be appropriate in future.

What are we proposing?

The Scottish Government is seeking views on whether Scottish Ministers should have powers which would better allow future amendments to the 1994 Habitats Regulations. This would provide the ability to ensure that the regulations remain fit for purpose in future and do not effectively become frozen in time.

The 1994 Habitats Regulations are now thirty years old and have been amended to ensure their continued effectiveness on numerous occasions, which indicates there will continue to be a need for an enabling power in future. Some amendments were even made immediately before EU Exit because we were aware that the enabling powers available under the European Communities Act 1972 were going to be lost. We used this opportunity to allow for Scottish Ministers to delegate maintenance of Scotland’s register of European sites to NatureScot. This has enabled NatureScot to

host a more accessible version of the register online via SiteLink, rather than it being physical register stored at a Scottish Government building.

We are also seeking views on what limitations should be placed on these powers, whilst recognising we cannot fully predict every potential future scenario where such powers could be used. We want to ensure the appropriate balance is achieved between providing flexibility to amend the regulations to make important improvements and/or adapt to future circumstances, whilst ensuring they continue to effectively underpin environmental protection and assessment processes.

It is not possible to predict every circumstance under which the need for an enabling power may arise in future, although some potential scenarios have been identified. Any future use of the powers would be subject to public consultation and the appropriate impact assessments.

Below are some examples of how enabling powers could be used in future.

Scenario A

The 1994 Habitat Regulations form part of a wider framework of nature conservation legislation in Scotland and we need to ensure that they can function effectively both in their own right and within this wider context.

For example, section 36 of the regulations makes further provision in relation to byelaw making powers for the protection of European marine sites under section 37 of the Wildlife and Countryside Act 1981. However, this no longer makes sense because section 37 of the Wildlife and Countryside Act 1981 was repealed by the Marine and Coastal Access Act 2009 and the Marine (Scotland) Act 2010.

An enabling power would allow Scottish Ministers to update this provision to reflect the current legislative framework.

Scenario B

The 1994 Habitat Regulations place a duty on Scottish Ministers to adapt the UK site network (and specifically European sites in Scotland) in order to meet management objectives for the network. The management objectives relate to achieving or maintaining favourable conservation status for certain habitats or species listed in the EU Habitats Directive, and to ensuring the survival and reproduction of certain wild bird species listed in the EU Birds Directive.

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

Scottish Ministers could amend the 1994 Habitats Regulations in future to ensure that European protected sites can be adapted to meet changing circumstances.

The reason for using a power in this way would be to ensure that Scottish Ministers can effectively meet their duties in relation to the UK site network, and to ensure that conservation effort can be targeted where it is most needed.

The following set of questions relate to the 1994 Habitat Regulations, please use the information provided to assist you.

Question 4

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

- Yes
- No
- Unsure
- Other – Please explain

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

Question 5

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

- Yes
- No
- Unsure
- Other – Please explain

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

Question 6

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

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

Part 4 - Impact assessments

In Scotland, public bodies including the Scottish Government are required to assess, consult on, and monitor the likely impacts their plans, programmes and strategies will have on the environment, businesses, island communities and equalities. This helps to better protect the environment, aims to ensure that any development is sustainable and equitable, and increases opportunities for public participation in decision-making.

In this section we are asking questions to gather evidence and lived experience to inform our impact assessments.

The consultation relates to proposed enabling powers rather than their future use. We believe that the enabling powers themselves will not have impacts, but these will need to be considered in full if the proposed powers are used in future.

Business

A Business and Regulatory Impact Assessment (BRIA) is used to analyse the costs and benefits to businesses and the third sector of any proposed legislation or regulation.

As enabling powers give the Scottish Ministers the power to amend certain regulations in the future but do not in and of themselves amend any existing primary or secondary legislation. We believe that the powers we are consulting on will not have any direct or indirect impacts on the costs and burdens placed on businesses, the public sector, voluntary and community organisations. Any future use of the powers would be subject to public consultation and the appropriate impact assessments.

Question 7

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

- Yes
- No
- Unsure
- Other – Please explain

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

Question 8

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

- Yes
- No
- Unsure
- Other – Please explain

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

Island communities

Section 7 of the Islands (Scotland) Act 2018 states that a relevant authority – which includes Scottish Ministers – must have regard to island communities when carrying out its functions. Scotland's islands face particular challenges around distance, geography, connectivity and demography, so it is important that this is considered when developing the proposals in this consultation. It is also important that we ensure that the islands receive fair and equitable treatment and that policy outcomes are tailored to their unique circumstances.

As enabling powers give the Scottish Ministers the power to amend certain regulations in the future but do not in and of themselves amend any primary or secondary legislation, we believe that the powers we are consulting on will not have any effect on an island community which is significantly different from the effect on other communities. Any future use of the powers would be subject to public consultation and the appropriate impact assessments.

Question 9

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

- Yes
- No
- Unsure
- Other – Please explain

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

Question 10

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

- Yes
- No
- Unsure
- Other – Please explain

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

Equalities

The Equality Act 2010 provides a framework to ensure we address inequality for people with protected characteristics listed in the Act. These are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

An Equality Impact Assessment (EQIA) is a tool to help to anticipate the needs of diverse groups when making decisions about projects, policy or service delivery, and helps us to meet our duties under the Act.

As enabling powers give the Scottish Ministers the power to amend certain regulations in the future but do not in and of themselves amend any primary or secondary legislation. We believe that the powers we are consulting on will not have any effect on people with protected characteristics. Any future use of the powers would be subject to public consultation and the appropriate impact assessments.

Question 11

Do you agree with our assessment that the proposed enabling powers in relation to the EIA regimes will not have any impact on people with protected characteristics?

- Yes
- No
- Unsure
- Other – Please explain

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

Question 12

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

- Yes
- No
- Unsure
- Other – Please explain

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

Environment

In Scotland, the Environmental Assessment (Scotland) Act 2005 requires public bodies including the Scottish Government, to assess, consult on, and monitor the likely impacts of plans, programmes and strategies they are preparing that are likely to have a significant impact on the environment. The assessment is known as a Strategic Environmental Assessment (SEA) and helps to better protect the environment and ensure the public are better informed when being consulted on proposals.

We have reached the opinion that the introduction of the proposed enabling powers themselves would not have a significant impact on the environment. Future use of the powers by Scottish Ministers could potentially have significant impacts on the environment (either positive or negative), and the requirement for Strategic Environmental Assessment would therefore need to be considered on a case-by-case basis. A [pre-screening report](#) to this effect has been prepared and submitted to the SEA Gateway.

Further comments

Question 13

Do you have any further comments you wish to add?

Please provide any further comments.

Thank you for providing your views

Should you wish to provide further information you can contact us via email at eahabsregsconsultation@gov.scot or write to:

EIA and Habitats Regulations Consultation Response

Restoration team

Area 1B North

Scottish Government

Victoria Quay

Edinburgh

EH6 6QQ



© Crown copyright 2024



This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-83521-998-0 (web only)

Published by The Scottish Government, March 2024

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1424414 (03/24)

W W W . g o v . s c o t