

11 October 2023

Marine Directorate  
Scottish Government  
St Andrew's House, Regent Road,  
Edinburgh, EH1 3DG

Dear Elaine Tait,

**Response: Scottish Government consultation on proposals to close fishing for sandeel in all Scottish waters (July 21, 2023)**

Scottish Renewables is the voice of Scotland's renewable energy industry. Our vision is for Scotland to lead the world in renewable energy. We work to grow Scotland's renewable energy sector and sustain its position at the forefront of the global clean energy industry. We represent over 340 organisations that deliver investment, jobs, social benefit and reduce the carbon emissions which cause climate change.

Our members work across all renewable technologies, in Scotland, the UK, Europe and worldwide, ranging from energy suppliers, operators and manufacturers to small developers, installers, and community groups, as well as companies throughout the supply chain. In representing them, we aim to lead and inform the debate on how the growth of renewable energy can provide solutions to help sustainability heat and power Scotland's homes and businesses.

Scottish Renewables (SR) welcomes the opportunity to provide our view on The Scottish Government's consultation on proposals to close fishing for sandeel in all Scottish waters. We have opted to provide our response within this letter and to support SR's response, **we append below a legal guidance note as Annex A to this response.**

In response to this consultation, our members have highlighted the following key points which are covered in further detail below:

- Our members are supportive of the range of ecosystem benefits which could arise as a result of the closure of the sandeel (*Ammodytes* spp.) fishery outlined by the Marine Directorate.
- Strongly recommend that, if pursued by the Marine Directorate, the benefits of the sandeel fishery closure in regard to seabirds should be explicitly made available to offshore wind farm projects as part of any compensation measures required under the Habitats Regulations.
- Whilst the developer-led and Scottish Government work on regional and strategic compensation measures is still underway, sandeel closures as a compensation measure

is currently the only available strategic-scale measure to deliver compensation at scale. The measure is therefore required to facilitate the consenting of Scottish offshore wind projects in line with The Scottish Government's offshore wind deployment and net-zero emissions targets. Failure to make these benefits available will put the delivery of The Scottish Government's [Draft Energy Strategy and Just Transition Plan](#) at risk in addition to the associated development of supply chains, associated employment and investment opportunities as well as the wider economic benefits of achieving Scotland's offshore wind target.

- In our view, the Review of Scientific Evidence of the Potential Effects of Sandeels Fisheries Management on the Marine Environment is partial. It does not fully consider the latest and best available evidence on the benefit of sandeel closures to seabird demography. The best available evidence provides clear support for the closure of sandeel fisheries to benefit seabirds.

We advise that explicitly making the benefits of the closure available as a compensation measure for offshore wind farm projects will maximise the benefit to The Scottish Government in achieving its legally binding target of reaching net-zero by 2045 and the binding interim targets for 2030 and 2040.

### **Closure of Sandeel Fishery in All Scottish Waters**

The benefits of increased sandeel abundance and availability to the marine environment are well understood and supported by robust evidence. The evidence base is reviewed in detail by the consultation documents. The recent detailed Berwick Bank Offshore Wind Farm Derogation Case further documents this position<sup>1</sup>. The Scottish offshore wind sector is supportive of both the direct and wider ecosystem benefits which are likely to arise as a result of the proposed closure.

We note that the proposed closure of sandeel fishing in all Scottish waters is supported by a number of organisations with interests in conservation, including the Royal Society for the Protection of Birds (RSPB)<sup>2</sup> and the National Trust for Scotland<sup>3</sup>. RSPB has also taken a similar position<sup>4</sup> in a separate consultation on sandeel fishing closure in English waters<sup>5</sup>, with RSPB's campaign on the issue attracting over 32,000 coordinated responses. Further, over 138,000 coordinated responses were raised through a parallel campaign conducted by Greenpeace<sup>6</sup>.

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<sup>1</sup> [https://marine.gov.scot/sites/default/files/eor0766\\_berwick\\_bank\\_wind\\_farm\\_application\\_-\\_3\\_derogation\\_case\\_-\\_fisheries\\_compensatory\\_measures\\_evidence\\_report.pdf](https://marine.gov.scot/sites/default/files/eor0766_berwick_bank_wind_farm_application_-_3_derogation_case_-_fisheries_compensatory_measures_evidence_report.pdf)

<sup>2</sup> [Proposal to end commercial sandeel fishing a lifeline for Scottish seabirds \(rspb.org.uk\)](#)

<sup>3</sup> [End sandeel fishing to protect... | National Trust for Scotland \(nts.org.uk\)](#)

<sup>4</sup> [Ban Industrial Sandeel Fishing campaign - quick update! - Nature's Heroes - Blog - Nature's Heroes - The RSPB Community](#)

<sup>5</sup> [Consultation on spatial management measures for industrial sandeel fishing - GOV.UK \(www.gov.uk\)](#)

<sup>6</sup> [Petition to Ban Industrial sandeel fishing \(greenpeace.org.uk\)](#)

Support for strict management and/or closure of sandeel fisheries to address a range of marine spatial management and ecological priorities is strong.

Scottish Renewables and our members also agree with the findings of the supporting consultation documents that the closure of the Scottish sandeel fishery will not result in any material negative economic consequences for the Scottish fishing industry or island communities. This is because annual sandeel fishing quotas within Scottish waters are allocated to fishing vessels from countries other than the UK. Sandeel has not been fished commercially by a UK fishing vessel since 2021 with only one vessel with sandeel Fixed Quota Allocation (FQA) in the UK, which has not been allocated in recent years<sup>7</sup>. In 2023, EU countries have been allocated 97.03% of the Total Allowable Catch (TAC) for sandeel in UK waters<sup>8</sup>. Instead, this option has the potential to benefit both industries due to the dependence that economically important species, such as cod, haddock and whiting, have on sandeel, as highlighted in supporting consultation documents.

### **Sandeel Fishery Closure and the Offshore Wind Industry**

The Scottish Government must adhere to the legally binding target of reaching net-zero by 2045 and the binding interim targets for 2030 and 2040. These statutory obligations must be considered in the development of all relevant policies, including this proposed closure of the Sandeel fishery in Scottish waters.

To meet these legally binding net-zero requirements for 2045 (Scottish Government)<sup>9</sup> and 2050 (UK Government)<sup>10</sup> it is recognised that a large proportion of the GW required will come from offshore wind. [The Scottish Government's Offshore Wind Policy Statement](#) (October 28, 2020) previously identified a target of a minimum of 11GW of offshore wind by 2030 (now subject to review) and the UK Government has an ambition to achieve 50GW of offshore wind by 2030<sup>11</sup>. As things currently stand, these targets remain unmet and significant additional offshore wind capacity is required at pace.

Currently, there are several key hurdles that have the potential to significantly hamper meeting these targets. One, related to this consultation, is the potential requirement of Scottish offshore wind developments (over 31GW combined), 20 ScotWind projects awarded lease, (totalling over 27GW), as well as some near-term projects, Berwick Bank (4.1GW) and 13 Innovation and Targeted Oil and Gas (INTOG) leasing round projects (5.5GW) to submit derogation under the

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<sup>7</sup> [Scottish Sandeel Ban to be Confirmed, Fishing News, 31 May 2023](#) and [Sandeel fishing boat operators fail to challenge UK Government, Scottish Legal News, 02 March 2023](#)

<sup>8</sup> [European Union and the United Kingdom – sandeel fisheries consultations: written record for 2023 - gov.scot \(www.gov.scot\)](#)

<sup>9</sup> [Climate Change \(Emissions Reduction Targets\) \(Scotland\) Act 2019 \(legislation.gov.uk\)](#)

<sup>10</sup> [New legally binding environment targets set out - GOV.UK \(www.gov.uk\)](#)

<sup>11</sup> [British energy security strategy - GOV.UK \(www.gov.uk\)](#)

Habitats Regulations, with the requirement for compensation measures to offset the potential effects on seabirds.

In 2021, draft guidance was published by DEFRA to assist offshore wind farm developers in English waters with the derogation process<sup>12</sup>. This guidance presented a hierarchy for compensatory measures should the other requirements of derogation be met, the premise of which is that measures benefitting the feature which is impacted by the development are the most preferable. Each step down the hierarchy moves away from “like-for-like” compensatory measures, and may potentially decrease the certainty of success, and therefore increase the level of compensation required. “Non-like for like” compensatory measures are considered those that do not directly relate to the original impact. They follow a gradation of preference as the proposed measures target different populations of the same species (same ecological function), different species or different locations (comparable ecological function) with wider ecological systems benefits being least preferred.

The amount of compensation required needs to at least compensate on a 1:1 ratio with the features lost. In practice, the compensation ratio agreed for offshore wind projects has been far greater than 1:1 to allow for uncertainty of success. It is generally understood that going down the hierarchy increases the amount of compensation required.

As more offshore wind farm projects are required to secure compensation measures as part of derogations under the Habitats Regulations, the availability of realistically deliverable measures to enable subsequent projects to follow the same approach decreases. This is simply because the number of like-for-like options to compensate on a species-specific basis is very limited. Work already being done by ScotWind developers on potential derogation cases only serves to emphasise this problem. Strategic compensation measures like sandeel fishery closure will therefore be required for the ScotWind programme to proceed in any meaningful way.

A lack of options for seabird compensation measures would substantially increase the risk of offshore wind projects in Scottish waters not reaching the application stage, being delayed, or even refused consent. Without a clear pathway to deal with issues around compensation, the risk increases that the offshore wind industry will not be able to make the critical contribution that is required to ensure net-zero targets are met. A knock-on consequence of immediately deliverable projects, such as Berwick Bank, ScotWind and INTOG projects not being realised would be a lack of early, anticipatory supply chain investment in Scotland and a failure to deliver key aspects of the Draft Energy Strategy and Just Transition Plan.

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<sup>12</sup> DEFRA, 2021. Best practice guidance for developing compensatory measures in relation to Marine Protected Areas (For consultation).

The availability of wider ecological systems benefits (such as the proposed sandeel fishery closure) as compensation measures also has the potential to provide substantial benefits to seabirds and other taxa, at the same time as enabling the deployment of additional offshore wind capacity. Whilst several workstreams are ongoing to investigate all possible compensation measure options, no other strategic measure has been identified (that we are aware of) that is predicted to be able to deliver the level of benefits likely required to enable the currently proposed levels of offshore wind deployment in Scottish waters.

It is therefore essential that should Scottish Ministers and the Marine Directorate implement the proposed sandeel closure in Scottish waters, this closure must then qualify as a strategic compensation measure under the Habitats Regulations. This would help both to provide broad ecological benefits and improve resilience in seabird populations (particularly considering highly pathogenic avian influenza), and significantly increase the likelihood of meeting the legally binding net-zero targets through the deployment of new offshore wind projects. This represents an opportunity for The Scottish Government to benefit both offshore renewables and the Scottish fishing industry through the proposed closure of the sandeel fishery in all Scottish waters. Further, The Scottish Government has an opportunity to show support for the offshore wind industry, particularly considering the failures of the recent Contracts for Difference (CfD) auction.

Acknowledging that questions have been raised by some stakeholders around the allocation of the benefits of sandeel closures, we append a legal guidance note explaining why there is no legal impediment that would prevent The Scottish Government from making the maximum use of sandeel closures from delivering both strategic compensation for offshore wind and general environmental benefit and resilience to seabirds and the wider marine environment. The note also explains the importance of explicitly allocating the closures to offshore wind compensation if the full benefits of any closure for Scotland are to be achieved. **Please see the legal guidance note attached below as Annex A to this response.**

It is trusted that the concerns and matters of our members raised above will be fully considered. Scottish Renewables would be keen to engage further with this agenda and would be happy to discuss our response and/or legal guidance note in more detail.

Yours sincerely,



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## Annex A: Pinsent Masons LLP Legal Guidance Note

### Response to Scottish Government consultation on proposals to close fishing for sandeel in all Scottish waters (July 21, 2023): the Legal Backdrop

#### 1. BACKGROUND AND EXECUTIVE SUMMARY

- 1.1 In July 2023, The Scottish Government published its consultation paper on proposals to close fishing for sandeel in all Scottish waters (the Consultation). The stated purpose of the Consultation is to bring about wider environmental and ecosystem benefits, including to sandeel and seabirds and the achievement of Good Environmental Status (GES) under the Marine Strategy Regulations 2010<sup>13</sup>.
- 1.2 The Scottish Government has set targets for the installation of 11 gigawatts (GW) of offshore wind by 2030, as part of its commitment for Scotland to be net-zero by 2045. The competitive ScotWind and Innovation and Targeted Oil & Gas leasing rounds run by Crown Estate Scotland have demonstrated the potential for this ambition to be realised.
- 1.3 To obtain its necessary consents, each offshore wind project will have to satisfy the requirements of the Habitats Regulations Assessment/Appraisal (HRA) regime, including, in the majority of cases for future projects, delivering compensatory measures for impacts on protected seabird species as part of a “derogation case”. Under the Habitats Regulations, the obligation to secure that any compensatory measures pursuant to a derogation case are taken rests with the consenting authority, which in the case of the offshore arrays is the Scottish Ministers.
- 1.4 It is widely acknowledged that this presents a significant challenge to the delivery of sufficient offshore renewable generating capacity to meet the Scottish and UK Governments’ targets. As the Energy Bill Factsheet for Offshore Wind<sup>14</sup> explains, the “*significant delays*” arising in the consenting process are “*primarily caused by the complexity of environmental impacts of developments and requirement for novel compensatory measures to be developed*”. Designing such compensatory measures “*has proved to be challenging, resulting in significant delays to the consenting process whilst packages are developed and agreed.*”
- 1.5 Strategic compensatory measures are fundamental to the delivery of future offshore wind projects. We understand that the level of impacts from some projects will not be able to be compensated for by any other means, and for smaller scale projects, it is unlikely to be

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<sup>13</sup> which transposed the requirements of the Marine Strategy Framework Directive (Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive))

<sup>14</sup> [Energy Security Bill overarching factsheet - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/714444/energy_security_bill_overarching_factsheet.pdf)

cost effective to deliver project specific measures. The closure of sandeel fisheries has been identified as the only effective measure which can be taken now to compensate for the potential ornithology impacts of future offshore wind development.<sup>15</sup> Failing to deliver sandeel fisheries closures via a mechanism that provides legally robust compensation for offshore wind projects would therefore put the pipeline of future projects at risk of significant delay or ultimately mean they do not come forward. It would be a missed opportunity to demonstrate The Scottish Government's support of the offshore wind industry and would run directly contrary to the achievement of the 11GW target.

- 1.6 The view of Scottish Renewables members is that the **Scottish Ministers ought to be clear that HRA compensation for offshore wind is the reason for the sandeel fisheries closure**. This would provide clarity for all concerned, including on the legal and policy position. It would also not take anything away from the fact that it will also produce wider ecological benefit generally.
- 1.7 This note considers how sandeel fisheries closure could be applied as compensation for the potential ornithological impacts of offshore wind for other ecological purposes. In summary, there is no legal prohibition on a sandeel fisheries closure being explicitly applied as HRA compensation for offshore wind, while also achieving wider environmental benefit including in response to avian flu. In doing that, The Scottish Government can lawfully realise a multifaceted suite of environmental, net-zero and socio-economic benefits from the closure, as well as being used explicitly as compensation for potential impacts of offshore wind.
- 1.8 The converse, however, is not necessarily true. In particular, for the reasons set out in section 2, closing fishery grounds explicitly in order to achieve GES could introduce unnecessary legal debate as to the extent that the closure of sandeel fisheries can also be allocated to offshore wind.
- 1.9 The choice for The Scottish Government is therefore at root a straightforward one: achieve the same benefits to the environment either (i) in a way that explicitly allows those benefits to be used as compensation for potential impacts of Scottish offshore wind and therefore gives the opportunity for projects requiring compensation to proceed at the pace required to hit 2030 targets, as well as benefitting the environment or (ii) in a way that allocates those benefits to GES, thereby potentially only benefitting the environment and potentially resulting in those benefits not being available as offshore wind compensation, which will stymie the development of Scottish offshore wind.
- 1.10 This note may not be relied upon by any person except with our prior written consent.

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<sup>15</sup> For a summary, please see paragraphs 421 to 424 and Table 22 of the Derogation Case for Berwick Bank Wind Farm: [eor0766\\_berwick\\_bank\\_wind\\_farm\\_application - 1. derogation case.pdf \(marine.gov.scot\)](#); see also p.323-327 of the MacArthur Green report commissioned for Natural England on assessment of compensatory measures for impacts of offshore wind farms on seabirds

## 2. APPLYING ECOLOGICAL BENEFITS FOR COMPENSATION AND GENERAL ENVIRONMENTAL BENEFIT

2.1 The obligation in the HRA Regulations is for the relevant decision maker to ensure that any necessary compensatory measures are secured. The Consultation does not make any mention of the potential application of the ecological benefits of sandeel fisheries management as compensation for offshore wind development, instead citing more general ecological reasons and the achievement of GES.

### *Additionality*

2.2 When evaluating proposals for compensatory measures as part of a derogation case under HRA, the Scottish Ministers will consider whether the measures are “additional” to normal activities required for species conservation.

2.3 The additionality principle is stated in EU Guidance<sup>16</sup>: “*Compensatory measures should be additional to the actions that are **normal practice** under the Habitats and Birds Directives or obligations laid down in EU law. For example, the implementation of conservation measures under Article 6(1), or the proposal/designation of a new area already inventoried as being of Community importance, **constitute ‘normal’ measures** for a Member State. Thus, compensatory measures should go beyond the normal/standard measures required for the designation, protection and management of Natura 2000 sites*”. (emphasis added).

2.4 In the draft Scottish Guidance “Framework to Evaluate Ornithological Compensatory Measures for Offshore Wind” (DTA Ecology), developers are referred to this EU Guidance and the guidance also confirms that the: “*reference to ‘normal/standard measures’ emphasises that the measures which the Commission intends to exclude are those which are reasonably accepted as ‘normal practice’ (i.e. within the bounds of everyday financial and political realities).*” and “*Potential compensatory measures need to be considered with an open mind, in light of the specific pressures and threats facing the qualifying features which are negatively affected, on the basis of a credible assessment of what might otherwise be delivered on the site as ‘normal practice.’*”

2.5 Defra guidance<sup>17</sup> (which also remains in draft) refers to “additionality” in this context as: “*...compensation must be additional to **the normal practices** required for the protection and management of the MP[A] so that measures should provide additional benefit.*” (emphasis added)

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<sup>16</sup> “Managing Natura 2000 sites, The provisions of Article 6 of the Habitats Directive 92/43/EEC”, EC 2018

<sup>17</sup> “Best practice guidance for developing compensatory measures in relation to Marine Protected Areas”, Version for Consultation, Defra 2021



- 2.6 Therefore, if sandeel fisheries closure is not normal practice required to fulfil a legal obligation, the guidance supports sandeel fisheries closure as additional and therefore capable of being applied as HRA compensation.
- 2.7 Closing sandeel fisheries cannot reasonably be regarded as “*normal practice*” and no specific legal obligation exists. In particular, regulators are under a duty to achieve Good Environmental Status (GES) pursuant to the Marine Strategy Regulations 2010. It is not however possible to reasonably “read in” an obligation to manage sandeel fisheries in the North Sea as something which must follow from that broad duty. If it were possible to “read in” obligations in this manner, then it could be argued that any action by the competent authority which could have ecological benefits for the relevant seabird species must run from the need to achieve GES. In other words, all and any actions which would produce ecological benefit for marine waters would be “used up” and it would be impossible to demonstrate any additionality as it could always be argued that all and any actions are pursuant to GES duties. This cannot in our view be reconciled with the ability to provide compensation for adverse effects.
- 2.8 If, however, GES is explicitly stipulated as the reason for the closure of sandeel fisheries, it might be argued that this is pursuant to a legal obligation and so the closure would not be available for offshore wind compensation, because it would not be additional.
- 2.9 In summary, then, the current legislative framework enables the Scottish Ministers to rely on sandeel fisheries closure as compensation, whilst also acknowledging the wider environmental benefits including increased resilience in the seabird populations in response to avian flu. Those environmental benefits would also be taken into account in any assessment of whether GES is achieved. However, if Scottish Ministers rely on sandeel fisheries closure for the purposes of achieving GES, it might be argued that it will not be available for offshore wind compensation. It would therefore be clearer and simpler for all parties concerned if the primary purpose of the closure was explicitly identified as HRA compensation and that should be the Scottish Ministers’ approach.

#### *The Effect of the Energy Bill*

- 2.10 The legal importance of explicitly allocating strategic compensation measures like the closure of sandeel fisheries to offshore wind is also recognised in the draft Energy Bill which is in the final stages of consideration in Parliament before Royal Assent.
- 2.11 The relevant proposed provisions will apply in Scottish and English waters. They are focused on enabling strategic compensation, including via the establishment of a Marine Recovery Fund, whilst also specifically making provision for a regulator to designate actions it takes in the discharge of any of its functions as discharging its obligation to secure compensation for an offshore wind project.
- 2.12 S287 (Strategic compensation for adverse environmental effects) of the Energy Bill provides:

- “(1) This section applies where a public authority is subject to one or more environmental compensation obligations in relation to one or more relevant offshore wind activities.*
- (2) “Environmental compensation obligation” means—*
- (a) a statutory duty (however expressed) to secure that measures are taken to compensate for adverse environmental effects of an activity, or*
  - (b) a statutory condition (however expressed) requiring a public authority, before granting consent for the doing of an act by a person (“P”) in connection with an activity, to be satisfied that P will take or secure the taking of measures to compensate for adverse environmental effects of the act.*
- (3) The public authority may determine that—*
- (a) measures taken or secured by the authority in the exercise of any of its functions, or*
  - (b) measures to be taken or secured by the authority in the exercise of any of its functions, are to count towards discharging the environmental compensation obligation 5 or obligations to which the authority is subject.*
- (5) The measures referred to in subsection (3) may be measures taken at the site or sites of the activities to which the measures relate or elsewhere. ...*
- (7) For the purposes of subsection (3), a public authority (“authority A”) may, with the consent of another public authority (“authority B”), treat measures taken or secured (or to be taken or secured) by authority B as taken or secured (or to be taken or secured) by authority A in the exercise of any of its functions.”*

2.13 There is therefore a clear direction of travel towards facilitating strategic compensation in Scottish waters. This provision will enable: (a) measures taken/secured or to be taken/secured by the Scottish Ministers as regulator in the exercise of any of its functions to be applied as a compensatory measure, and this includes measures taken “off-site” from the relevant project; and (b) measures taken or to be taken by any other public authority to be applied as a compensatory measure by the Scottish Ministers, with that authority’s consent. Therefore, once the Bill is enacted (noting no secondary legislation is required under this provision), this provision will further consolidate the current legislative position enabling the Scottish Ministers to rely upon sandeel fisheries management as compensation.

### 3. CONCLUSION

3.1 Overall it is clear therefore that there is no legal reason why sandeel closures could not be applied as compensation for offshore projects as well as for environmental purposes (including in response to avian flu). Expressly stating compensation for offshore projects as the purpose of the sandeel fisheries closure in future documentation relating to the closure would make the position clear for all concerned.