

Case ID: IESS.21.011

Description: Consideration of the effectiveness of the site protection system in respect of Ramsar sites in Scotland

Case Summary

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| What was the issue? | A representation received by ESS asserts that there is a gap between the legal protection given to Ramsar sites in Scotland and the protection requirements given in the Ramsar Convention, an international agreement to which UK is a signatory. |
| What did ESS do? | ESS accepted the case for “pre-investigation.” We researched the relevant legislation and policy, along with data associated with Ramsar sites. We requested information from SG to understand their existing policy and any intentions to revise the policy. |
| What was ESS’ conclusion? | While we remain concerned about this perceived gap, we concluded that we would not formally investigate or intervene presently as the Scottish Government has committed to review Ramsar site protections in the upcoming delivery of their “30x30” Framework. ESS will monitor this process to determine if it rectifies the issues raised. |

Background

The Convention on Wetlands of International Importance especially as Waterfowl Habitat (“the Ramsar Convention”) is an international treaty for the conservation and sustainable use of wetlands. The UK is a “contracting party”, as a signatory to the convention. Contracting parties commit to designating suitable wetlands for the list of Wetlands of International Importance and to ensure their effective management.

Following the convention text, Contracting parties cannot remove¹ designated areas unless it is in the “urgent national interest” and, if this is the case, then they must compensate for any loss of wetland area by establishing new habitats.

It is Scottish Government (SG) policy that Ramsar protection requirements are achieved by co-designating Ramsar sites under the following protection regimes:

- European sites (formerly known as Natura 2000 sites) which include Special Protection Areas (SPA) and Special Area of Conservation (SAC), underpinned by the Conservation (Natural Habitats, &c.) Regulations 1994
- Sites of Specific Scientific Interest (SSSI), underpinned by the Nature Conservation (Scotland) Act 2004

This “two-tier” system of co-designation was stated in Scottish Planning Policy (SPP) 2014, and has been carried through to the draft Fourth National Planning Framework (NPF4)². European site protections are considered to be stronger than SSSI protections in developments which are likely to have a detrimental effect on protected features. In these instances, European site protection allows for development only where:

- no other suitable sites are identified;
- there are imperative reasons of overriding public interest; and
- compensatory measures are delivered to ensure the overall coherence of the European site network.

These protections align closely with Ramsar Convention requirements when contracting parties propose to remove designated Ramsar areas.

¹ ESS refers to “removal” of Ramsar areas as relating to the Ramsar Convention description: “to delete or restrict the boundaries of wetlands already included by it in the List”; ESS interprets this as a development or re-working of the area which results in the area no longer meeting Ramsar criteria.

² The purpose of SPP is to set out national planning policies which reflect Scottish Ministers’ priorities for operation of the planning system and for the development and use of land. NPF3 (2014) is a long-term plan for Scotland that sets out where development and infrastructure is needed. NPF4 will guide spatial development, set out national planning policies, designate national developments, and highlight regional spatial priorities; it will be a long-term plan looking to 2045. The draft NPF4 was released in November 2021 and is not yet finalised (as of August 2022); the final NPF4 will replace both NPF3 and SPP 2014.

Scotland's approach to the protection of Ramsar sites is different to the rest of the UK, which is to apply European site protections to all Ramsar sites. Essentially, the rest of the UK does not utilise a two-tier system.

Typically, all Ramsar areas are also SSSI areas. Additionally, 50 of 51 Ramsar sites in Scotland are also largely covered by European site co-designation. However, spatial overlap does not necessarily apply the higher protection standards of European sites to all features within that boundary. In January 2019, the Scottish Government published a guidance note titled *Implementation of Scottish Government policy on protecting Ramsar sites*. This note discusses qualifying interests³ to dictate which protection regimes apply to Ramsar features:

- Where Ramsar interests coincide with European site qualifying interests protected under an SPA or an SAC, as the case may be, the interests are thereby given the same level of (legal) protection as European sites.
- Where Ramsar interests are not the same as European qualifying interests but instead match SSSI features, these receive protection under the SSSI regime.

NatureScot has recently updated key Ramsar documents ("Ramsar Site Citations")⁴ which describe the Ramsar site, list the features of interest, and confirm the criteria these sites meet to warrant their designation. The recent additions specify the applicable regime (SSSI or European site) for each Ramsar interest.

Summary of concerns reviewed by ESS

A member of the public submitted a representation to ESS expressing concerns that Scotland's compliance with the Ramsar Convention may be at risk due to a "gap" in environmental law. The representation highlighted instances where SG has stated (for example, in responses to Parliamentary Questions) that European site protections apply to Ramsar sites, and considers the January 2019 SG Ramsar guidance note to be a detrimental change in policy which should have been subject

³ Qualifying interests are the species or features which are protected under each designation.

⁴ Ramsar Site Citations are accessible through NatureScot's Sitelink resource at: <https://sitelink.nature.scot/home>

to the process of due consultation. Examples of concerning developments cited in the representation were the proposed Coul Links golf course, and the construction of the golf course at Menie Estate (which resulted in partial denotification of the Foveran Links SSSI).

Having considered the information received, in ESS' view, the primary concern raised is as follows: Under the current two-tier regime, any Ramsar feature(s) afforded SSSI protection could theoretically be permitted for development (effectively deleting Ramsar areas) without first proving an urgent national interest and without creating offset habitats. Such a development would be perceived as contravening Ramsar requirements.

Scottish Government response to ESS queries

ESS requested reasonable assistance under the SG's co-operation duties as set out in Section 23(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. We received responses to our queries, and SG documents which review Ramsar policy options in relation to NPF4 and 30x30 (SG's commitment to achieve 30% of land and sea protected for nature by 2030).

SG's documents and their responses to ESS do not characterise the SSSI regime as incompatible with Ramsar requirements. However, SG has acknowledged their policy appearing out of step with the rest of the UK, and that this has attracted criticism that Scotland is 'falling behind'. SG have stated to NatureScot that the current policy can cause confusion, particularly in the planning system.

SG reviewed options to strengthen Ramsar policy while developing NPF4, but they decided against changes under that framework. SG have stated to ESS that Ramsar protections will instead be reviewed as part of the wider 30x30 considerations.

NatureScot are currently working on the framework for delivery of 30x30, which has a target date of March 2023 for publication. Part of this work is to ensure Scotland delivers its contribution to international obligations, including the Ramsar Convention. SG has indicated the upcoming Natural Environment Bill may be a mechanism to introduce any new provisions needed for Ramsar site protections, subject to the findings of the 30x30 Framework.

Assessment

ESS' criteria for investigation requires consideration of whether the matter arises from a significant or potentially significant incident concerning the environment. In this instance, ESS has not identified any known contravention of Ramsar requirements to date in relation to the perceived gap – none were identified by the representation contact, from our selected review of planning applications within Ramsar sites or from our consultation with relevant parties. We have therefore carefully considered the likelihood of a future contravention occurring due to the perceived gap, to evaluate the potential for a significant incident.

The findings of our evaluation are summarised as follows:

- SSSI designations do afford a degree of protection against development, even if these are not as strong as European site protections. NatureScot is a statutory consultee for any planning applications which may affect SSSIs and have the ability to raise objections, which can cause an application to be called in by Scottish Ministers.
- The golf course at the Menie Estate is an example of development being permitted on a SSSI after Scottish Ministers called in the application and decided that the economic benefits outweigh the detrimental impacts. Post-construction, affected areas lost their SSSI status. This demonstrates the lower level of protection given to a SSSI relative to a European site. However, this site did not have Ramsar co-designation; had this been the case, it may have resulted in a different outcome.
- The proposed development where the two-tier policy was tested the most strongly was Coul Links, a proposed golf course situated within Ramsar areas. Planning was approved by Highland Council, but due to an objection by NatureScot it was called in by Scottish Ministers. Ministers ultimately denied permission for the development, maintaining the integrity of the Ramsar site. Although this could be seen as an example of the system working, the applicants appear to be working towards submitting a revised planning application for this site.

- ESS has reviewed the mapping of all 51 Ramsar sites and the extents of overlapping SSSI and European site protections. With a few exceptions, most Ramsar areas have overlapping European site designations, typically SPA, and less commonly SAC. The Ramsar interests typically linked to SSSI protections are the landscapes and environments – e.g. sand dunes, mud flats, and salt marshes. Interests typically linked to European site protections are avian species for SPAs and flora for SACs. While the landscapes/ environments may be assigned lower-level SSSI protections, the protected species which are present in these environments would typically receive European site protections. An example of this was the assessments presented in the Public Local Inquiry (PLI) report after Coul Links was called in by Scottish Ministers. ESS considers that this reduces, although does not eliminate, the likelihood of a Ramsar contravention in the context of a large-scale development.
- ESS has reviewed September 2021 correspondence from NatureScot, which states “Ramsar sites have generally not played a big part in planning or other casework, and so the risk of continuing with the current policy for a few more years may be low (Coul Links aside).” NatureScot is an advisory body that serves as a statutory consultee where planning proposals may affect protected sites. As noted already, NatureScot’s objection in the Coul Links application led to the application being ultimately rejected which, in ESS’ view, demonstrates the application of the current checks and balances in the system.
- ESS has carried out a high-level review of all accessible online planning applications submitted in the last five years within selected (30 out of 51) Ramsar sites. We have reviewed the NatureScot consultations, the planning decisions, and conditions of planning when NatureScot or RSPB submitted objections. We have not found evidence that any of these developments have, or could lead to, deletion of Ramsar areas. Where the potential for negative impacts to interests were identified by NatureScot (usually assessed as SSSI or European site interests, instead of Ramsar interests), it was typically through agreed mitigation strategies or restrictions given in planning

conditions that the impacts would be managed and the developments were allowed to proceed.

- In review of SG responses and correspondence to date, ESS are reasonably assured that SG will explore Ramsar policy improvement through the 30x30 Framework and Natural Environment Bill, so greater clarity is expected within the coming year.

Conclusion

Although the perceived gap cannot be fully discounted as a potential risk to Ramsar sites, ESS' review has, to date, found no evidence that a significant environmental incident (a large-scale deletion of Ramsar areas, in contravention of Ramsar convention requirements) has occurred. ESS also notes that the Scottish Government has committed to review Ramsar protections within 30x30, and work is already underway by NatureScot in this connection.

In light of this, and taking into account the current checks and balances in the system, ESS has decided against formal investigation or intervention at this time.

As part of our monitoring work, ESS will continue to assess the co-design work on 30x30 and Nature Networks, and Scottish Government's development of the Natural Environment Bill. This will also contribute to our understanding of the actions being taken to address biodiversity decline – one of our proposed analytical priorities set out in our draft Strategic Plan that was published for consultation in May 2022. As part of this work, ESS can observe the progression of Ramsar policy review.

ESS has therefore decided to close the case. We can re-consider formal investigation of these concerns in the future if:

- we become aware of a forthcoming or actual contravention occurring, through the perceived gap; or
- the outcome of 30x30 fails to materially address the apparent “out-of-step” nature of the two-tier system.

September 2022