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1. Environmental Standards Scotland (ESS) is a non-ministerial office (directly accountable to the Scottish Parliament), with a remit to monitor and secure improvements to:
 - public bodies' compliance with environmental law
 - the effectiveness of environmental law
 - the implementation and application of environmental law
2. ESS welcomes the opportunity to respond to the Scottish Government's consultation on proposals to introduce enabling powers to allow future amendment of Scotland's Environmental Impact Assessment (EIA) and Habitats Regulations. ESS has responded to specific questions of this consultation, set out below.
3. In considering ESS' response to this consultation, it is helpful to recognise the potential links with other consultations being held simultaneously by the Scottish Government, including:
 - a) Legislative proposals to create flexibility around designated sites and increase proactive management of protected areas, as part of Scotland's 30 by 30 biodiversity commitment on terrestrial and freshwater sites.
 - b) Legislative proposals to facilitate marine nature restoration and the application of Marine Conservation Orders to habitats and species undergoing restoration.

ESS recognises (and has responded accordingly) that a range of measures and tools are needed to facilitate attainment of the Scottish Government's overarching biodiversity objectives. These objectives include Scotland's commitment to be nature positive by

2030, to have restored and regenerated biodiversity by 2045 (as outlined in Scotland's Biodiversity Strategy), and to meet the obligations set out in the Global Biodiversity Framework. The range of measures proposed by these consultations (if well implemented) will, together, contribute towards the delivery of these goals and further environmental protection in Scotland.

Questions 1 and 4 – Do you agree with the Scottish Government's rationale for seeking enabling powers?

4. The consultation lacks detail on how the enabling powers may be used. For example, it only provides limited framing of the enabling powers, and the policy aims are not clearly defined. The examples given of how the enabling powers could be used cover small and administrative amendments, with little detail as to how the enabling powers may be used for any larger-scale reform. This obscurity is not commensurate with the scale of (and power afforded by) the enabling powers that are sought.
5. Notwithstanding, ESS broadly supports the principles of the Scottish Government's proposals for additional enabling powers to allow future amendment of both the EIA and Habitats regulations provided they are used to strengthen environmental law and its application in Scotland. The enabling powers must be used to ensure that the assessment processes remain rigorous and a high degree of environmental protection is delivered.
6. As previously stated, the proposed enabling powers present one of several policy measures that are currently under consideration by the Scottish Government. ESS recognises the need for collective action, using a broad range of tools and measures, to address long-term threats to Scotland's biodiversity and contribute towards delivery of the Scottish Government's overarching goals and commitments.
7. The ability to adaptively amend these regulations is of benefit where it delivers improved environmental outcomes. ESS would encourage that future enabling powers are used proactively, yet proportionately, to enhance the function of (and outcomes delivered by) these regulations. This includes ensuring that Scotland keeps pace with wider developments in environmental law and standards in this field.
8. To date, ESS has investigated several issues where the EIA and Habitats Regulations are of relevance, including:

- the measures taken to protect threatened bird species in Scotland (including the classification of Special Protection Areas)
- the Habitats Regulations Appraisals process in respect of whether a plan or project may have adverse effects on protected European sites in Scotland
- the application of the EIA (Agriculture) Scotland Regulations 2017
- the effectiveness of the site protection system in respect of 'Ramsar' sites (wetland sites of national importance) in Scotland

Given the prominence of these regulations and the significant role they play in environmental assessment and protection in Scotland, it is feasible that ESS may undertake further investigatory or analytical work where they are of relevance. The ability to enact swifter resolution to any issues that may be identified by ESS during our work is a benefit of proportionate enabling powers that are established with an effective framework.

Questions 2 and 5 – Do you agree there should be limitations on how Scottish Ministers can use the enabling powers?

9. Yes, ESS agrees there should be limitations placed on how the enabling powers can be used. There must be sufficient clarity to provide assurance that any future use of them is necessary, pragmatic and proportionate.

Questions 3 and 6 – Do you have any views on how we can set the scope of / limits on these enabling powers?

10. As previously stated, ESS advocates that any future use of the enabling powers is for the purposes of maintaining and enhancing the function of (and outcomes delivered by) the EIA and Habitats Regulations. This includes for the purposes of keeping pace with wider developments in environmental law and standards.
11. ESS supports the principle that any future use of the enabling powers would be subject to public consultation and appropriate impact assessment (as set out in the consultation). Public participation and appropriate scrutiny are essential to effective lawmaking. Therefore, ESS advocates that any secondary legislation brought forward under the enabling powers is subject to the full affirmative procedure and appropriate parliamentary scrutiny.

12. As previously set out, there is currently a lack of information on how the enabling powers may be used. To ensure that the scope of the enabling powers is appropriate, ESS suggests that the enabling powers should be defined objectively, framed as narrowly as possible and any powers to make (or amend) secondary legislation restricted by effective legal boundaries. Additionally, the policy aims should be included in the enabling legislation itself and the powers clearly framed to give an unambiguous indication of how they should be used.

13. As identified by the Scottish Government, there is potential for further divergence between UK nations on the approach taken to EIA and Habitats Regulations. Additional consideration should be given to the potential impact of this divergence during the impact assessment of any future use of the enabling powers.