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ESS response to the Scottish Government consultation on facilitation marine nature restoration through legislation

Introduction

1. ESS is a non-ministerial office directly accountable to the Scottish Parliament. Since 1 October 2021, it has been part of the system of environmental governance in Scotland following the UK's exit from the European Union and the end of oversight of implementation of European Union environmental law by the European Commission and the European Court of Justice. ESS' remit is to:
 - ensure public authorities, including the Scottish Government, public bodies and local authorities, comply with environmental law
 - monitor and take action to improve the effectiveness of environmental law and its implementation The Scottish Government has published A Human Rights Bill for Scotland: Consultation seeking views on their proposals establishing a framework of rights, including a right to a healthy environment, and duties for public bodies. ESS has responded to specific questions in this consultation and our response is included below.

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2. The Scottish Government has published a *facilitating marine nature restoration through legislation: consultation* seeking views on legislative proposals which would enable Scottish Ministers to introduce a registration process for marine nature restoration projects, and apply Marine Conservation Orders to habitats and species undergoing restoration and standalone European marine sites.

Response

1. **Do you think the example definitions provided are a suitable basis to frame a definition of marine nature restoration for the purpose of this legislation?**

Yes.

2. **Are there any other considerations or examples we should consider in formulating a definition for marine nature restoration?**

Yes. The example definitions provide a useful basis for developing a definition of marine restoration in Scotland. It is important that any definition is clearly explained and unambiguous. This includes clarification of what is meant by resilience and how it is measured in this context. It should also be clear what constitutes restoration and what the output(s) can be. For example, Natural England's definition details the aim to recreate natural habitats, while NatureScot refer to only high-level interventions, such as species restoration into a location from which it has been extirpated. Given this, there needs to be clarity on whether restoration is understood as restoring to a historic state where a species/habitat previously was present and/or restoring to any natural habitat, i.e. introducing seagrass to areas where it has not been historically present. This relates to defining the purpose of any restoration activity, for example restoring ecosystem functionality or increasing species' abundance, as this would constitute different forms of **restoration output**.

3. **Do you think registration should be based on the restoration 'project', rather than each individual 'activity'?**

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Yes.

4. Please share any considerations you have in relation to tying the registration process to a 'restoration project' rather than each individual activity.

Registering restoration at a project level will reduce the administrative burden for restoration projects and therefore better aligns with the aims of the proposal to create a more simplified process to carry out marine restoration in Scotland. Project level registration also enables greater flexibility to occur within a project than by activity-level registration, while also providing the scope for activities to be considered in a more holistic way. This includes flexibility in trialling different methodologies and responding to changes/developments that are likely to occur when carrying out marine restoration. Project-level consideration may also facilitate the future scaling up of any restoration. A project-level basis should also aid public transparency of any local-level restoration project and may encourage greater public engagement.

It is important that these proposals do not create an actual or perceived regulatory loophole for commercial activities, that are subject to the existing marine licensing process. There should be clearly defined guidance on what types of project or applicants this registration process is open to. If innovative mixed funding models are considered, it is essential that the scheme provides clarity on what type of projects can proceed when partially funded or undertaken by a commercial interest.

5. Please share any reflections you have on how we could set appropriate threshold(s) of environmental impact.

Any setting of environmental impact thresholds will need to consider and clearly set out how environmental thresholds may differ across marine taxa. Similarly, any environmental impact from proposed restoration activity may occur at different timescales depending on the habitat/species concerned or impacts being considered. When setting any definition of environmental impact or threshold, clarity should be given on what level environmental impact is considered, such as at a species level or wider ecosystem functioning.

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ESS is supportive of the principle that the thresholds should be informed by the best available evidence. They should also be adaptable, where new or better evidence becomes available, to ensure that the thresholds are set at the right level to deliver positive environmental outcomes.

8. Do you agree Scottish Ministers should have the option to devolve the administration of a registration process to another public body?

Yes. Appropriate delegation of the administration should aim to make the registration process more efficient and straightforward and should be aligned with the role of the chosen public body. Scottish Government should clearly articulate the role and remit of the delegated body in relation to this scheme in secondary legislation and provide appropriate supporting guidance.

9. Should a registration process be based on a self-declaration/self-assessment model or would you prefer an 'approval/application' based process?

Please see response to question 11

11. Please share any considerations or concerns you have on the nature of the registration process and whether it should be based on self-assessment or approval/application.

Whether the registration process is based on a self-declaration/self-assessment model, or an 'approval/application' based process, it is important it is targeted at the appropriate level with supporting guidance. An approval/application system should not just be a replication of the marine licensing process and projects awaiting approval. Rather, it should aim to be proportionate and deliver reduced timescales compared with licence approval. For a self-assessment process model, there would need to be clear guidance on what projects/activities qualify for registration. There would also need to be a clear process/governance from Scottish Ministers or the public body to ensure that self-registered projects are appropriately monitored and meet the registration requirements.

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Projects may need to assess wider ecosystem impacts and potential applicants may not have the necessary information to do this effectively for all schemes. Development of this scheme should consider how appropriate access to information and available/existing data, and the technical knowledge to assess these, can be accessed by applicants.

13. Do you think the register should be made publicly available? By publicly available we mean published online.

Yes, but only some information. Please see response to question 14.

14. Please share any concerns or considerations you may have with regards to providing information in the registration process and/or making information on the register publicly available.

ESS agrees, where possible, that information of any restoration activity/project should be made public where appropriate in accordance with the Aarhus Convention in respect to complying with public access to information. This will also ease access to relevant organisations (e.g. academic institutions, public bodies) in monitoring current restoration activity in Scotland and coordinating future projects. However, it is important that necessary exceptions, as stated in the consultation (e.g. the location of a sensitive species), should be considered where appropriate. Public access to information should help to increase public engagement with local restoration activities/projects and ultimately benefit any activity/project in the long-term.

15. Do you agree Scottish Ministers should have a broad post-registration power to intervene and amend/update/remove projects from the register?

Yes. Please see response to question 16.

16. Please share any comments you may have on instances where Scottish Ministers should be able to intervene post-registration.

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The ability of Scottish Ministers post-registration powers should enable appropriate scrutiny of any restoration activity/project to ensure projects are complying with their registration requirements and are not damaging the marine environment or posing other risks through inappropriate activity.

17. Do you agree Scottish Ministers should be able to create offences and penalties in relation to the registration process?

Yes. It is important that any licencing process or activity approval scheme has appropriate mechanisms to ensure compliance and discourage inappropriate activity that may result in environmental harm. Specifically, the misuse of the registration process for activities that require a licence and the incorrect registration of for-profit activities. Mandatory registration, with clear thresholds and appropriate guidance supported by proportionate enforcement measures should aim to support legitimate activities that have positive environmental outcomes and deter inappropriate activities.

19. Do you support bringing forward legislation to enable Scottish Ministers to develop a registration process for marine nature restoration projects?

Yes. The introduction of a well-designed registration scheme that is proportionate to the restoration activities it aims to address, is a positive addition to the current marine licencing process. Such a scheme that is appropriately supported, through secondary legislation, clear guidance, and the use of a relevant public body (if applicable), should aim to increase small-scale restoration activity in Scotland. It will also be an important step in facilitating actions concerning marine biodiversity and restoration set out in the Scottish Biodiversity Strategy and action against/mitigating climate change.

20. Do you think a registration process would help to reduce the administrative burden on restoration projects?

Yes.

21. Do you think a registration process would help encourage more restoration projects to come forward and/or scale up?

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Yes. The introduction of a well-designed registration scheme that aims to reduce the complexities currently associated with the marine restoration licencing process, is likely to make marine restoration more accessible at a community-level, therefore encourage greater restoration activity. The registration of marine activity at a project level should enable the scaling up of restoration as it may facilitate a more coordinated approach between restoration projects as opposed to singular licenced activities.

22. Please share any further considerations you have about the proposals as a whole.

The proposal is a positive step in facilitating marine restoration at a community-level in Scotland and should contribute to achieving the biodiversity targets set out in the Scottish Biodiversity Strategy. Restoration of Blue Carbon habitats will also contribute towards carbon sequestration and actions towards mitigating climate change. Despite this, much larger scale restoration will still need to be developed in Scotland given the size of the marine environment under Scottish jurisdiction and the importance of marine habitats (e.g. seagrass, saltmarsh, marine sediment) in responding to the climate crisis, both through physical adaptation and the sequestering of carbon from the atmosphere via Blue Carbon habitats. The proposals do not consider the role of passive marine restoration – the removal/reduction of anthropogenic pressures to allow natural regeneration of marine features. ESS is undertaking analysis on physical disturbance to the seabed as it is recognised as a key pressure impacting seabed habitats and it is important that marine activities are managed to enable natural seabed restoration. Given the small-scale, active marine restoration projects considered in this proposal it is likely that passive restoration will need to play a much greater role in restoring many of the priority marine habitats and species in Scotland to achieve its marine biodiversity targets.

23. Do you support the extension of existing Marine Conservation Order provisions under the Marine (Scotland) Act 2010 to be applicable to habitats and species undergoing restoration or which have been restored?

Yes. See response to question 26.

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24. Do you think there should be a requirement on Scottish Ministers to review any Marine Conservation Orders implemented for habitats or species undergoing restoration or which have been restored?

Yes. See response to question 26.

26. Do you have any other views you would like to share in relation to the proposal to extend the existing Marine Conservation Order provisions to habitats and species undergoing restoration or which have been restored?

The extension of existing Marine Conservation Orders (MCOs) to restored marine areas needs to ensure that provisions stated in the MCOs are effective at conserving the targeted species and/or habitat. For this, there should be effective management of MCOs provisions, including clear guidance on provisions set out in the MCO, clear guidance to local community groups and marine users, and monitoring of compliance of provision by relevant marine users. To ensure effectiveness of MCO provisions, MCOs will also need to operate across timescales appropriate for allowing restored habitat and/or species to fully establish. It is important that the development of a restoration scheme and any implementation of MCOs aims to ensure that the views of local groups and sea users are considered. This will help to encourage broader support for marine restoration activities and, ultimately, the long-term success of any restoration objectives.

27. Do you agree that MCO powers should be extended as outlined to be applicable to standalone European marine sites?

Other. ESS is currently investigating the application of legislation implementing EU Protected sites in Scotland. This includes the implementation of the Birds Directive through adequate use of Special Protection Areas and adequate protection requirements for RAMSAR sites in line with European protected sites. Given this, any extension of MCOs to standalone European marine sites for the purposes of marine restoration should ensure that any introduced provisions complement/are in addition to the existing measures set under the relevant Directives.

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33. Do you agree that the Strategic Environmental Report is an accurate representation of the potential impacts, positive and negative, on the environment from the proposed MCO changes?

Yes.

34. Do you agree with the findings of the Strategic Environmental Report that overall, the likely beneficial effects of the proposals outweigh the potential negative impacts?

Yes. Given the importance of restoration for achieving Scotland's biodiversity targets and its potential role in mitigating climate change, the highlighted limited potential impact of any small-scale restoration should not outweigh the need for nature restoration in Scotland. It is important that this is emphasised and clearly communicated in the delivery of any restoration project. In certain cases, for example the establishment of native oyster population, the longer-term impacts are likely to be multi-tiered, occurring at a species' level, across the wider marine ecosystem and the local economy. Therefore, any assessment of environmental impact should consider such multi-tiered changes.

35. Do you have any further comments you wish to add?

The legislative changes within this proposal and the ambition of acknowledging the importance of, and facilitating, marine restoration at a Scotland-level, are positive. This will support the delivery of Scotland's biodiversity targets in the marine environment. This proposal also better aligns Scotland with the developments of other devolved nations, including the focus on marine restoration in England in relation to Marine Net Gain and the marine restoration feasibility studies carried out across Wales and Northern Ireland. It is positive that the proposals complement the growing importance of restoring marine ecosystems at a wider international level.

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