



The Scottish Parliament
Pàrlamaid na h-Alba

Published 4 December 2024
SP Paper 703
17th Report, 2024 (Session 6)

Net Zero, Energy and Transport Committee

Net Zero, Energy and Transport Committee report on the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 (draft)



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
<http://www.parliament.scot/abouttheparliament/91279.aspx>

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Delegated Powers and Law Reform (DPLR) Committee consideration	2
Net Zero, Energy and Transport Committee consideration	3
Conclusion	9

Net Zero, Energy and Transport Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Transport and the Cabinet Secretary for Net Zero and Energy, with the exception of matters relating to just transition; and on matters relating to land reform, natural resources and peatland, Scottish Land Commission, Crown Estate Scotland and Royal Botanic Garden within the responsibility of the Cabinet Secretary for Rural Affairs, Land Reform and Islands.



netzero.committee@parliament.scot



0131 348 6039

Committee Membership



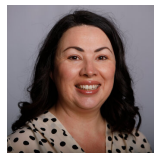
Convener
Edward Mountain
Scottish Conservative
and Unionist Party



Deputy Convener
Michael Matheson
Scottish National Party



Bob Doris
Scottish National Party



Monica Lennon
Scottish Labour



Douglas Lumsden
Scottish Conservative
and Unionist Party



Mark Ruskell
Scottish Green Party



Kevin Stewart
Scottish National Party

Introduction

1. The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 (draft) was laid before the Scottish Parliament on 28 October 2024. The draft instrument was referred to the Net Zero, Energy and Transport Committee for consideration and is subject to the affirmative procedure, meaning it must be approved by the Scottish Parliament before it can come into force.
2. It is for the Net Zero, Energy and Transport Committee to recommend to the Scottish Parliament whether the draft Order should be approved. On 6 November 2024, the Deputy First Minister and Cabinet Secretary for Economy and Gaelic, lodged motion [S6M - 15261](#), proposing that the Committee recommends the draft Order be approved.
3. This Order transfers to the Scottish Ministers' the power to make Environmental Outcome Report (EOR) regulations. EORs are the environmental assessments that are carried out in connection with applications for:
 - consent, approval or variation of consent under the Electricity Act 1989 for the construction, extension or operation of generating stations whether in Scotland or in the Scottish Renewable Energy Zone area;
 - consent under section 37 of the 1989 Act for the installation, or the keeping installed, of overhead electric lines above ground.
4. The policy note explains that the UK has operated a system of environmental impact assessment ("EIA") in reliance on the power conferred by section 2(2) the European Communities Act 1972. The function of making EIA regulations under the 1972 Act, in relation to electricity act consents, was executively devolved to the Scottish Ministers by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999, the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006 and confirmed through the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019. In Scotland, the relevant EIA regulations are the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017.
5. The policy note states that as a consequence of the repeal of the 1972 Act, the power to make EIA regulations under section 2(2) of that Act was lost. This has resulted in the Scottish Ministers no longer having an operative enabling power to amend environmental assessment processes and provisions within the 2017 Regulations, nor do the Scottish Ministers have powers to make new regulations.
6. The policy note further explains that the UK Government took powers in the Levelling-up and Regeneration Act 2023 to introduce a new system of Environmental Outcome Report ("EOR") regulations, to replace Environmental Impact Assessments ("EIAs") and Strategic Environmental Assessments ("SEA"). This instrument is transferring these powers to the Scottish Ministers.

Delegated Powers and Law Reform (DPLR) Committee consideration

7. At its meeting on 5 November 2024, the DPLR Committee considered the instrument and determined that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

[Read the Official Report - 5 November 2024](#)

Net Zero, Energy and Transport Committee consideration

8. At its meeting on 12 November 2024, the Committee took evidence on the draft Order from:
 - Kate Forbes, Deputy First Minister and Cabinet Secretary for Economy and Gaelic
 - Michael McLeod, Head of Marine Nature Enhancement Programme and Joint Environmental Accelerator Programme; and
 - Stewart Cunningham, Lawyer, Scottish Government.
9. The evidence taken at the meeting can be read in the Official Report, which is available at the following web page:

[Read the Official Report 12 November 2024](#)

Purpose of the Order

10. In her opening remarks, the Deputy First Minister stated that the purpose of the Order is to transfer certain regulation making functions to Scottish Ministers under the Levelling-up and Regeneration Act 2023. She provided some wider context, explaining that the UK Government created powers via the Levelling-up and Regeneration Act 2023 to introduce a new system of regulations on environmental outcomes reports to replace environmental impact assessments (EIAs) and strategic environmental assessments (SEAs). She noted that currently, environmental assessments for electricity works are undertaken under the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017, which are executively devolved to the Scottish ministers and are the basis on which they process, consult on, consider and determine applications for renewable energy projects, generating stations and onshore transmission infrastructure. As a consequence of the UK's exit from the European Union and the repeal of the European Communities Act 1972, the Scottish ministers no longer have the ability to amend or replace the 2017 regulations, nor can the Scottish Parliament pass primary legislation to reinstate, amend or change them. Therefore, the Scottish Government sought reinstatement of powers to amend the 2017 regulations under the 2023 Act as part of its negotiations with the UK Government regarding environmental assessment provisions. Rather than granting these powers under the 2023 Act, the UK Government had instead committed to this draft order to transfer these powers to the Scottish Ministers. She highlighted that these functions may be exercised concurrently with the Secretary of State.

Environmental Outcomes Reports and Existing Frameworks

11. The Committee sought clarification on the powers available to Scottish ministers under the regulations and their scope to take an independent approach to EORs. In response, the Deputy First Minister explained that the EIA system remains in place in Scotland, with no current plans to transition to EORs. The Deputy First Minister, stated that “the environmental impact assessment system continues to operate in

relation to relevant projects and plans in Scotland, and we have no current plans to adopt an EOR approach to environmental assessment.”ⁱ

12. She noted that the UK Government is considering EORs as a replacement for EU-derived systems, using powers in the 2023 Act, but its plans are still in development. She further noted that transitioning to a system of EORs would be a long-term and complex change, and a decision to contemplate such change would, therefore, require careful consideration.
13. The Deputy First Minister explained that the reason why the Scottish Government was pursuing an order under the Scotland Act 1998 when EORs are not yet fully developed was twofold. Firstly, the process must follow this sequence to ensure that the discretionary power is available for Scottish ministers to use once EORs are fully understood. Secondly, this approach was agreed upon by both the UK Government and the Scottish Government for devolving and transferring these powers.
14. The Committee sought reassurance about the Scottish Government's intentions regarding EORs as a potential replacement for EIAs and the level of consultation involved. The Deputy First Minister again emphasised that the current order under discussion does not alter the established EIA frameworks, which she described as "well-understood." She reiterated that any move toward adopting EORs would require extensive stakeholder engagement and consultation. The Deputy First Minister framed the discussion as primarily about regaining flexibility through the transfer of powers lost after the UK's exit from the EU, ensuring that Scotland retains the ability to adapt its environmental frameworks to future needs. She stressed that the conversation was not about fundamentally changing current practices but about securing mechanisms to future-proof Scotland's environmental protections on land and at sea.
15. The Committee asked whether the Scottish Government's approach allows flexibility to observe how EORs might function in practice and later decide whether to transition from EIAs. The Deputy First Minister agreed to an extent but stated: "We would be in control, because that is the purpose of this instrument, but we are also watching carefully to see what the UK Government might do in terms of transitioning to EORs. If it were to transition, that would be a long-term and complex process. As far as I know, we do not have final confirmation from the UK Government on what it intends to do along the lines of EORs."ⁱⁱ
16. The Committee asked about the framework under which a wind farm developer would currently operate if seeking consent. Officials explained that the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 remain in force as domestic law. However, the power to amend those regulations, previously granted under the European Communities Act 1972, was lost following the UK's exit from the EU. The Deputy First Minister confirmed that while the regulations remain unchanged for now, the policy intent behind the current order is to restore the power to amend them, ensuring they can adapt to future circumstances.
17. The Committee inquired about the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 and how EIA processes operated before

ⁱ Net Zero, Energy and Transport Committee, [Official Report](#), 12 November 2024, Col: 5

ⁱⁱ Net Zero, Energy and Transport Committee, [Official Report](#), 12 November 2024, Col: 11

its introduction. The Committee sought to understand whether the earlier frameworks were predominantly influenced by EU directives or developed independently in Scotland.

18. The Deputy First Minister and her officials, explained that Scotland has long operated under EIA regimes, predating the 2017 regulations. Officials clarified that prior to 2017, earlier EIA regulations existed. These domestic regulations were designed to implement EU directives, and the UK, as a member state of the EU, was required to comply with EU environmental standards by embedding them into domestic law.
19. Officials elaborated that the EU provided overarching principles and standards through its directives, but the responsibility for implementation and compliance rested with member states, including the UK. Scotland did not receive decisions from the EU about specific projects or policies but developed its framework to meet EU requirements.

Concurrent Powers and Interactions with UK Ministers

20. The Committee asked about the meaning of powers “to be exercisable concurrently” with UK Ministers. Officials clarified that under the Scotland Act 1998, it is possible for the UK Government to transfer functions so that the Scottish Ministers use the function “instead of” or “concurrently with” the secretary of state.
21. Officials explained that when regulatory powers over environmental assessments for electricity works were initially transferred in 1999, they were conferred concurrently. The reasoning at the time was tied to the implementation of EU obligations. Since the UK was the EU member state, UK Ministers sought to retain the authority to make regulations as a safeguard, ensuring compliance in cases where Scottish Ministers might act in breach of EU obligations.
22. Although the context has changed since the UK's departure from the EU, the UK Government has chosen to retain the ability to exercise these powers concurrently and the Scottish Government has no legal power to challenge this arrangement. Officials stated, that “It was essentially a decision of the UK Government, and it simply means that the UK Government also has the power to make regulations in this area in the same way that the Scottish ministers do.”ⁱⁱⁱ
23. Officials further clarified that while Scottish Ministers must consult the Secretary of State before using these powers, they are not required to seek consent. This means Scotland can pursue its approach independently, but the UK Government retains the authority to override Scottish regulations if they deem it necessary.

Potential Regulatory Conflicts

24. The Committee asked about the interaction of powers between the Scottish and UK Governments when exercising these regulatory functions and questioned what would happen if the Scottish Government took an approach that conflicted with the UK Government's. Officials explained that while Scottish Ministers must consult the Secretary of State before exercising the power, they are not required to obtain consent. Officials noted that while the Scottish Government could still exercise the

iii Net Zero, Energy and Transport Committee, [Official Report](#), 12 November 2024, Col: 7

power, even if that was in conflict with the UK Government, the UK Government could potentially use its powers to cut across what the Scottish Government was doing. However, they emphasised that should this situation arise, there would have to be some degree of dialogue and negotiation between the two governments.

25. The Committee characterised this arrangement as "proceed until apprehended," meaning the Scottish Government can exercise its functions unless the UK Government objects or intervenes. Officials agreed with this assessment, acknowledging the UK Government's ultimate authority in such cases.
26. The Committee further probed the extent to which the Scottish Government could resist a UK-wide EOR regime. Officials explained that while the Scottish Government has the authority to make regulations in certain areas, Scotland's offshore area is an example of where powers are reserved to the UK Government. Officials noted that the UK Government could implement an EOR regime offshore, and the Scottish Government would have to decide how to respond. Officials stated that "the Scottish Government certainly would not be able to completely override that decision."^{iv}
27. The Committee raised concerns about the potential for conflicting regulatory regimes, asking if developers might face dual standards under a scenario where the UK Government imposes EORs while Scotland retains EIAs. Officials acknowledged this as a possibility, particularly in the context of offshore and inshore because Scottish Ministers control the inshore area (0-12 nautical miles) and could maintain the existing framework there, while the UK Government might impose an EOR regime for offshore areas (12-200 nautical miles). This would result in developers navigating two distinct regulatory systems.
28. The Committee further questioned whether the restored powers would enable Scotland to adopt environmental policies distinct from those of the UK. The Deputy First Minister clarified that the order does not fully restore Scotland's pre-Brexit capacity to amend EIA regulations, as the UK Government cannot replicate EU-granted powers post-Brexit. Instead, the order transfers new regulation-making functions under the EOR framework to Scottish Ministers. These powers aim to replace some of the regulatory functions lost due to Brexit but are limited in scope. The Deputy First Minister described this transfer as part of broader efforts to address gaps in regulatory authority caused by the UK's departure from the EU.

Alignment with EU law

29. The Committee further questioned whether transitioning to an EOR regime would move Scotland out of alignment with the EU. The Deputy First Minister responded that the Scottish Government remains committed to aligning with EU standards wherever possible, emphasising that the adoption of the current instrument does not signal a fundamental regulatory change. She highlighted that the existing 2017 Environmental Impact Assessment (EIA) Regulations remain in place and that Scotland is independently consulting on improvements to frameworks like the 1994 Habitats Regulations. The Deputy First Minister also pointed to the planned Natural Environment Bill, which aims to ensure regulations remain robust and fit for purpose.

30. Officials added that, in the absence of clear details from the UK Government, the transition to EORs could simply involve a rebranding of the existing regime, keeping Scotland largely aligned with EU standards. However, if more substantial changes were introduced by the UK, Scotland would need to reassess its position and consider the extent of divergence from EU principles.
31. The Committee asked about Scotland's engagement with the EU regarding ongoing developments in environmental assessment, as EU law continues to evolve, particularly with enhanced commitments on nature. The Deputy First Minister confirmed that the Scottish Government actively monitors changes at the EU level, and referenced the non-regression clause in the Levelling-up and Regeneration Act 2023, which ensures that any EOR regulations must not reduce environmental protections below the level in place when the Act was passed. Additionally, the Deputy First Minister explained that the Act mandates that EOR regulations must comply with the UK's international obligations. The Deputy First Minister cautioned that if the instrument transferring powers is not passed, Scotland would lose the ability to adapt regulations independently, leaving it subject to UK Government decisions on EORs.

Making future policy changes

32. The Committee sought to clarify whether the new powers would make it easier for the Scottish Government to implement significant policy changes, such as requiring all power lines to be offshored or put underground.
33. The Deputy First Minister cautioned against drawing conclusions about the ease or difficulty of implementing specific outcomes due to several uncertainties. She emphasised that any future changes would depend heavily on the UK Government's direction regarding EORs. Currently, EORs are a conceptual framework introduced through a UK Government consultation seeking to replace EU-derived environmental assessment processes. However, the Deputy First Minister noted that there is no concrete information on how, when, or if EORs might be implemented, nor on their potential structure. Consequently, she argued it is impossible to determine whether the proposed order would facilitate specific outcomes, as the order primarily deals with procedural control rather than the substance of environmental regulations.
34. The Deputy First Minister reiterated that the Scottish Government has no immediate plans to alter the well-understood EIA system. She stated that if the instrument passes, it would restore the ability to future-proof and improve consenting processes. However, this does not equate to enabling immediate or significant changes. When pressed on whether regaining these powers would allow the Scottish Government to align regulations with political priorities, the Deputy First Minister again explained that such significant changes, like a transition to EORs, would require extensive consultation and engagement with stakeholders and would be part of a long-term and complex process.
35. The Committee asked whether the government had engaged with Environmental Standards Scotland (ESS) regarding the issues under discussion. Officials clarified that ESS had not been consulted during the drafting of the current Statutory Instrument (SI). However, they emphasised that if the powers under the SI were to be utilised, the Scottish Government would consult and discuss it with ESS. The Deputy First Minister reinforced that the SI concerns the transfer of powers, not

substantive changes to environmental regulations, which would involve broad consultation when appropriate.

36. The committee discussed the need for clarity and improvement in environmental assessment regimes, citing criticisms of the current EIA system in England, such as incomplete data, inaccessible non-technical summaries, and challenges for community understanding. The Committee asked whether the Scottish Government was open to refining its approach to EIAs and where it saw opportunities for improvement.
37. In response, the Deputy First Minister highlighted the Scottish Government's recent consultation on proposed powers for amending the 1994 habitats regulations and various EIA regimes in Scotland. She emphasised that responses to the consultation are being carefully considered to determine the best way to proceed.
38. She said: "Nothing stands still. We want to ensure that the regulations and the legislation that form the EIA regimes, which are the key frameworks that underpin the important environmental protections and assessment processes in Scotland on land and sea, are fit for purpose and are achieving ministers' aims of protecting the environment, reducing biodiversity loss and meeting our climate change targets. We want all those to be fit for purpose."^v
39. The Deputy First Minister also mentioned the forthcoming Natural Environment Bill, set to be introduced during the current parliamentary year, as a key legislative vehicle for integrating updates to environmental regulations.
40. The Committee highlighted the importance of a "joined-up approach" and asked how the consultation on EIAs and habitats regulations will inform the new legislation to ensure optimal environmental outcomes.
41. The Deputy First Minister responded by emphasising that these issues are a central focus for Scottish Ministers, noting that they "dominate the Scottish ministers' discussions"^{vi} and feature prominently on the agendas of Gillian Martin (Acting Cabinet Secretary for Net Zero and Energy) and Alasdair Allan (Acting Minister for Climate Action). The Deputy First Minister underscored the importance of maintaining established regulatory frameworks, stating, "the regulations process is tried, tested and well understood."^{vii} She explained that the government is focusing on ensuring that "the substance of the regulations is in line with ministers' objectives"^{viii} rather than overhauling the entire process.

v Net Zero, Energy and Transport Committee, [Official Report](#), 12 November 2024, Col: 17

vi Net Zero, Energy and Transport Committee, [Official Report](#), 12 November 2024, Col: 17

vii Net Zero, Energy and Transport Committee, [Official Report](#), 12 November 2024, Col: 17

viii Net Zero, Energy and Transport Committee, [Official Report](#), 12 November 2024, Col: 17

Conclusion

42. Following the conclusion of evidence taking, the Deputy First Minister moved motion [S6M - 15261](#) in her name:

That the Net Zero, Energy and Transport Committee recommends that the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 [draft] be approved.

The motion was agreed to without debate or division.

The Net Zero, Energy and Transport Committee recommends that the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 [draft] be approved.

