

Legislation, Justice and Constitution Committee response evidence REUL

Provided in addition to points raised in the WEL evidence submission.

The changes proposed by the Retained EU Law (Revocation and Reform) Bill (REUL) have the potential for significant impacts to cross border and Welsh Marine Protected Areas (MPAs).

There are risks of two-tier system for cross border sites, potentially hindering delivery of the biodiversity deep dive recommendations. The introduction of new categories of legislation could create issues relating to clarity and accessibility. Especially for marine developments that span more than one jurisdiction, e.g. Impacts resulting from offshore developments, for which Wales does not have devolved competency such as oil, gas, marine renewable energy.

The implications are twofold; firstly, degrading the current, often underperforming, legislation hindering Marine recovery ambitions even further and, secondly the REUL proposals could also limit Welsh Governments ability to enhance existing legislation in line with achieving the biodiversity deep dive recommendations.

For example, the *British Energy Security Strategy* is the UK Government's response to rising energy prices. With both areas not fully devolved to Wales and with proposals either within Welsh waters (Offshore Wind), or adjacent to the Welsh Sea Area (Oil & Gas). With respect to offshore wind energy and oil/ gas production the strategy calls for:

- Offshore Wind: 50GW by 2030 from offshore wind, with 5GW from floating offshore wind in deeper seas. Underpinned “*by new planning reforms to cut the approval times for new offshore wind farms from 4 years to 1 year and an overall streamlining which will radically reduce the time it takes for new projects to reach construction stages while improving the environment*”¹.
- Oil and gas: “*a licensing round for new North Sea oil and gas projects planned to launch in Autumn, with a new taskforce providing bespoke support to new developments – recognising the importance of these fuels to the transition and to our energy security, and that producing gas in the UK has a lower carbon footprint than imported from abroad*”.

UK Government announced a Growth Plan (2022), with an aim of *accelerating the construction of vital infrastructure projects by liberalising the planning system and streamlining consultation and approval requirements*ⁱ reflects the objectives of the Energy Security Strategy towards the Planning Act (2008) and Habitats Regulations.

Section 3.36 of the Growth Plan (2022) indicates that reform will be via:

- reducing the burden of environmental assessments
- reducing bureaucracy in the consultation process
- reforming habitats and species regulations
- increasing flexibility to make changes to a Development Control Order (DCO) once it has been submitted.

The list indicates that reform will extend past the Habitats Regulations to the Planning Act (2008) and EIA Regulations. Losing or downgrading this assessment framework impacts the accuracy of supporting information to enable planning and marine licensing decisions that protect marine habitats and species. Considering some sites are cross border and that mobile features of Welsh Marine Protected Area (MPAs) may rely on UK MPAs outside Welsh waters, reduction in

¹ Possible link with Net Gain.

protection outside of Wales may have serious implications to the ability of Welsh Government to deliver the outcomes of the Biodiversity deep dive.

The proposals from UK Government policy pose a threat to the natural capital of the UK, and the MPA network, through their stated objective of removing the protections provided by EU derived regulations. It is unclear how such an approach would be applied to sites with shared management plans such as Liverpool Bay SPA or the Severn Estuary SAC. However, changes should not be limited to erosion of existing power or the lowering of standards. Below are some examples of risks and potential opportunities;

The Conservation of Habitats and Species Regulations 2017: The basis of the Habitats Regulations is to prevent impacts from developments, to protect sites and indirectly, our Natural Capital. The Conservation of Habitats and Species Regulations (2017) enables the designation of, and provides protection to, all European Special Protection Areas (SPA) and Special Areas of Conservation (SAC) within 12 miles of the UK coastline. If a plan or project, including energy or infrastructure proposals, are being considered within or adjacent to one of these European sites, the regulations require a Habitats Regulations Assessment (HRA) to be undertaken to assess the effect of such proposals on the integrity of the site's features (habitats and species). Such an assessment can be required to also consider the "in-combination" impacts of other plans and projects. Importantly, the regulations require HRAs to be undertaken as part of marine licensing under the Marine and Coastal Access Act 2009 and for development consent under the Planning Act 2008, including Nationally Significant Infrastructure Projects such as offshore wind developments.

Removal of the Habitats Regulations would take away the protections afforded to habitats and species within the UK inshore MPA framework based upon SPAs and SACs. Replacement legislation to establish and manage the existing and future SACs, SPAs or an alternative designation would be required. A key point is that the regulations form the legal basis that underpin the existing SAC and SPA sites within the UK MPA network, and Welsh waters.

While a possible replacement could be via the Marine Conservation Zone (MCZ) designation under the Marine and Coastal Access Act (2009) alongside with the MCZ assessment procedure, these would not be a like for like replacement. The Habitats Directive that forms the basis to the Regulations, has a huge amount of casework and legal decisions from the European Court of Justice (ECJ) and UK law that define the interpretation of the legal framework with respect to the designation and protection of SPAs and SACs. However, the HRA process will not necessarily lead to habitat improvement and recovery: i.e., the regulations may be adequate for development control, but a future revision could be further enhanced to enable proactive improvement of the sites designated under the regulations.

Conservation of Offshore Marine Habitats and Species Regulations 2017: The Conservation of Offshore Marine Habitats and Species Regulations 2017 provides similar statutory duties and protection to that of the Habitats and Species Regulations (above) but extends these powers offshore from 12 nautical miles of the coast. Regulations 28 and 29 of the Regulations are like those of the Habitats Regulations (above) with respect to assessment of plans and projects and overriding public interest. Removal of the Habitats Regulations would take away the protections afforded to habitats and species within the UK offshore and the MPA framework based upon SPAs and SACs.

Marine Works (Environmental Impact Assessment) (Amendment) Regulations 2017: The regulations amend those of 2007, providing the UK enabling legislation for the EU EIA Directive 2011/92/EU and the amendments of Directive 2014/52/EU. These amendments link to Part V (Marine Licensing) of the Marine and Coastal Protection Act (2009) and Part II (Deposits in the Sea) of the Food and Environmental Protection Act 1985 with respect to licensing. The regulations set out the requirements for undertaking an Environmental Impact Assessment (EIA), documented within an Environmental Statement (ES). Removal of the Marine Works (Environmental Assessment) Regulations would in effect undermine the ability of the UK marine licencing system to protect the marine environment from development and disposal activities.

Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015: The Offshore Petroleum (Offshore Safety Directive) Regulations 2015 enact the Directive 2004/35/EC. Regulation 10 places financial liability for the prevention and remediation of environmental damage resulting from offshore petroleum operations on the licensee. Environmental damage within the regulation's references, but does not document within the UK regulations, the definition used within Directive 2004/35/EC: *"damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favorable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;"*

Article 5, Article 6, Article 7, Annex I and Annex II of the Directive sets out preventative and remedial actions to address environmental damage from offshore petroleum licensing. These too have not been clearly defined within the UK regulations, nor the Environment Act (2021).

Removal of the Offshore Petroleum (Offshore Safety Directive) Regulations 2015 would take away a legal definition of Environmental damage, together with the framework to prevent and remediate impacts to marine habitats from oil and gas development. While Welsh Government has made clear that no further oil and gas developments will occur in Welsh waters, UK government has set out proposals in adjacent waters – located near to the cross-border Liverpool Bay SPA. Therefore, erosion of protection in English waters could have implications for protection in Wales.

The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001: Provides the basis for undertaking appropriate assessment of oil and gas plans and projects with respect to the Habitats (Council Directive 92/43/ EEC) and Birds (Directive 2009/147/EC). Regulation 5 sets out the requirements for appropriate assessment, with Regulation 6 specifying the conditions for overriding public interest. Removal of these regulations would have a similar impact to those of the other Habitats Regulations (see above).

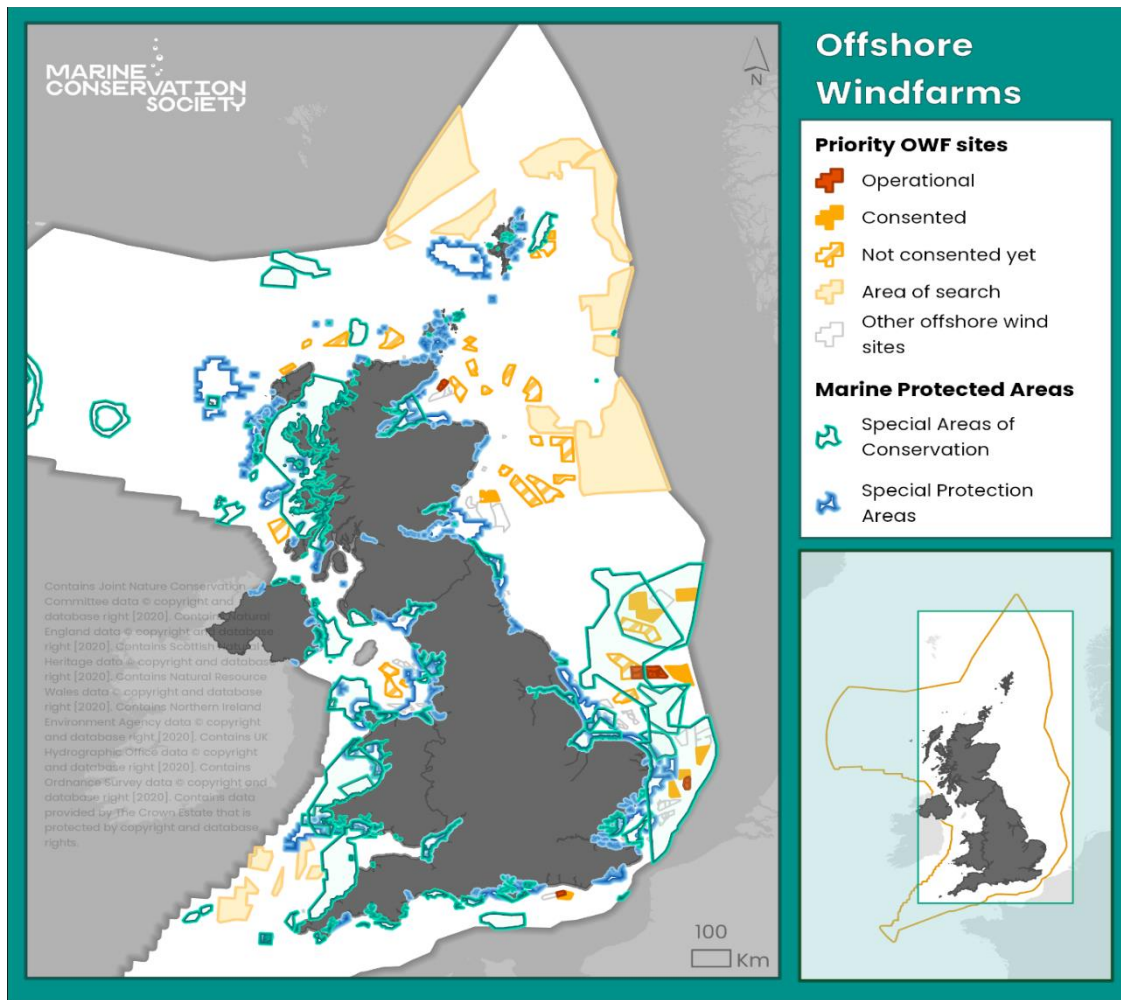
CASE STUDY: OFFSHORE RENEWABLES LICENSING

Annex B of the UK Government Growth Plan (2022) identifies groups of offshore wind projects² as priorities for reaching renewable energy targets. Map 1 (below) shows operational, consented and priority not consented/ proposed/ search areas for offshore wind. Many adjacent to Welsh MPAs, and likely to have some impact on the mobile features of these sites. Despite the protection supposed to be provided by MPA designation, sites (SACs, SPAs, and MCZs) in Wales may be impacted by a number of presently unconsented and proposed sites included in the Growth Strategy (2022).

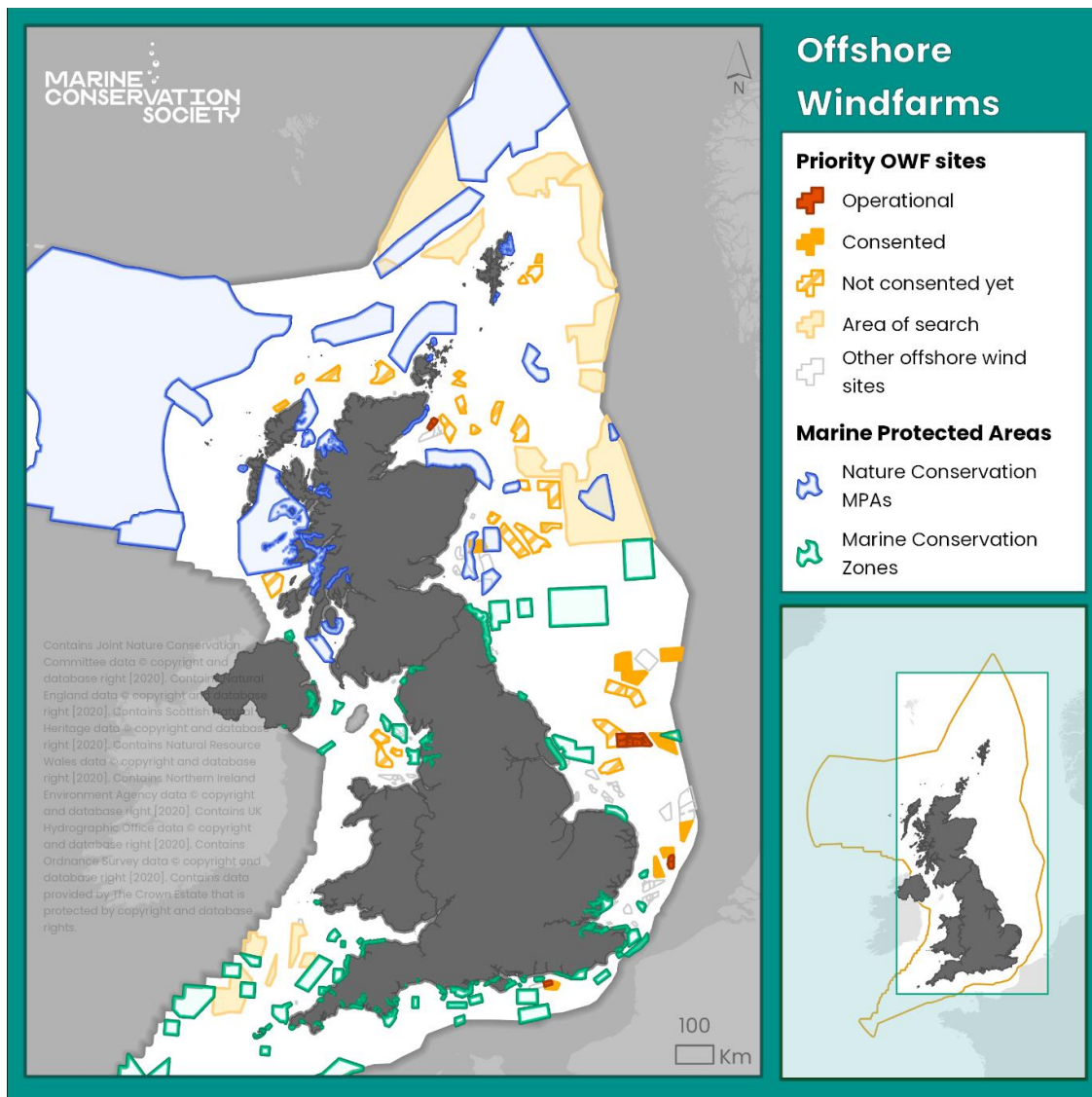
The development of offshore renewables to address climate change is essential, provided such developments *fully take into account the impacts on marine ecosystems and provide appropriate mitigation to eliminate or minimise to a negligible level such damage to these ecosystems*. Current technology enables static turbines to be placed in waters <60m deep, with Floating Offshore Wind Turbines (FOWT) able to be placed in deeper waters (>100m). The following sections define the potential impacts to marine ecosystems and the implications of losing EU derived legislation.

Noise and Electromagnetic Fields: construction of static turbine foundations, using pile driving results in extreme noise over large areas. For marine mammals this can cause avoidance behaviour, whilst fish species may suffer mortality from tissue damage. In extreme cases, piling has been cited as a cause of hearing loss in marine mammals. Associated activities of seabed preparation, drilling, dredging or intensified vessel traffic may cause marine mammal and fish species to leave the locality of construction. Long-term, the impact is potentially limited as species may return to the area once construction activity has ceased. As turbines increase in size, generation power and number; corresponding noise levels are likely to increase. The existing Habitats and Environmental Assessment Regulations require developers to consider the implications of such changes in the intensity of impacts.

Map 1 Marine Protected Areas (SACs and SPAs), Operational, consented and priority not consented/ proposed/ search areas for offshore wind.



Map 2 Marine Protected Areas, Operational, consented and priority not consented/ proposed/ search areas for offshore wind.



Species vulnerable to these impacts include harbour porpoise found within Bristol Channel Approaches / Dynesfeydd Môr Hafren, and seabird features of the Grassholm SPA, Skomer, Skokholm and the Seas off Pembrokeshire / Sgomer, Sgogwm a Moroedd Penfro and the Liverpool Bay / Bae Lerpwl SPA,

Pollution: Two potential sources of pollution have been identified during construction and operation of wind turbines. Firstly, the remobilisation of pollutants from sediments during construction (e.g., piling, dredging), particularly if those pollutants can accumulate in foodchains. Many UK Sea areas, notably locations within and near the estuaries of existing and former industrial areas have a legacy of marine pollution within sediments. The current provisions of the Habitats and EIA regulations require developers to consider and prevent these pollution risks but only if the safeguards provided by the legislation are left in place.

Areas that may be vulnerable to remobilisation of pollutants are sites near former or currently industrialised estuaries where cables are brought ashore and works involve disturbing sediments. Bird species will also be vulnerable to accidental spills. Pollution from shipping accidents pose a risk to adjacent SPAs designated for seabirds.

Entanglement: The use of mooring lines and cables by Floating Offshore Wind Turbines (FOWT) creates a risk of entangling and killing marine mammals and fish species. The impact takes two forms: primary and secondary entanglement. Primary entanglement is where a creature, potentially larger marine mammals, and sharks, becomes entangled in the turbine's moorings and cables. Secondary entanglement occurs where ropes, fishing gear etc. becomes entangled and in-turn entangles marine wildlife, like 'ghost fishing'. The impact is not well understood, as the use of FOWT is limited within UK

waters, emphasising the need to retain HRA and EIA regulations to ensure developers take account of entanglement risks. With developments planned in the Celtic Sea area, it is important that the legislation that requires the impacts to protected sites features is retained, to ensure that new developments are nature positive in addition to climate positive.

Habitat loss/change: Construction of offshore turbines could lead to habitat degradation and loss through direct impacts or changes in sedimentation regimes causing smothering. Piling of foundations, dredging and laying of cables and related infrastructure will damage and destroy seabed habitats in a similar way to oil and gas development. Construction within MPAs impacts protected species or is within sensitive/ vulnerable habitats (e.g., Habitats Directive Annex I Natural Habitats and Annex II Species) that are currently protected by the Habitats Regulations. In addition, removal of the EIA Regulations would undermine consideration for non-EU derived sites, e.g., MCZs.

The loss of this protection could lead to the disruption of ecosystem processes and properties by construction within these sensitive sites, altering food webs and impacting on associated species. A direct impact to benthic communities may then ripple through food webs to impact pelagic species distribution.

Alongside direct physical damage, constructing foundations for static wind turbines can disturb sediment into the water column during dredging and piling. Resultant increases in sediment (turbidity) can harm juvenile fish and other sensitive organisms and lead to smothering of seabed communities. In shallow inshore waters increase suspended sediments and alter sedimentation rates/ longshore sediment transport resulting in habitat change. Once again, undertaking a HRA or EIA can identify methods to mitigate these impacts, but only if the Habitats and EIA Regulations are retained.

MPAs vulnerable to seabed habitat damage include, of interest to Wales, South of Celtic Deep.

Invasive Species: Unfortunately, new at sea developments may be accompanied by opportunities for non-native/ invasive species colonisation. Turbine construction with the proliferation of new foundations and anchoring points across a wide, area may also provide corridors that allow non-native species to propagate and expand their range into previously unconnected areas. The cost of prevention is far lower than the cost of removal and existing planning and licensing conditions, advised by HRA and EIA, consider the need for monitoring and corrective actions if undesirable impacts (e.g., invasive species) occur. Loss of these regulations could remove the ability of regulators to justify such safeguards.

The Welsh Government therefore has an important role to play in ensuring the revocation and reform of retained EU law in devolved areas. For example, where proposals impact or hinder the delivery of Devolved legislation (E.g. the Future Generations and Wellbeing act), Welsh Government should have right to veto changes that would result in a lowering of standards.

While understandable given the resource implications for doing so, Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and reserved potentially hinders the Welsh Government's ability to respond and challenge proposals made under the REUL bill. However, it should also be noted that the deadlines imposed by the bill provide a significant risk of their own, drawing Welsh government resource away from the implementation of planned or existing policies or legislation designed to improve the natural environment of Wales. Given the apparent limitations of Defra to fully review the extent of the implications of the REUL bill to UK Legislation, it would be unfair to expect Welsh Government to complete a similar review of its own.

We share the concern that the bill may introduce new limitations for the Welsh Government, which wants to improve pre-Brexit standards. The ambitions set out in the recent biodiversity deep dive set a clear agenda for improvement. In contrast the REUL bill, if implemented as proposed, would not only undermine those ambitions, but actively hinder them.

It is therefore imperative that the Welsh Government's plays an active role in the planned UK Government's joint review, ensuring the scope of regulation-making powers granted to the Welsh Ministers by the Bill not only include scrutiny procedures attached to those powers, but also the power to improve standards as required.

Examples of where existing powers could be strengthened;

1. Existing regulations and legislation could be strengthened to meet or exceed current EU derived standards by ensuring that the environmental principles (including the "Precautionary Principle") contained within the Environment Act 2021 are strengthened and clearly defined for incorporation into all future amendments and replacements of current regulation and legislation to protect MPAs, priority species and habitats.
2. Ensure that planning and marine licensing decisions continue to be supported by HRA (possibly via enhanced MCZ assessment) and EIA
3. Protection of the UK MPA network could be strengthened through:
 - a. the provision of minimum legal standards for HRA and EIA
 - b. legislation to meet or exceed current EU derived standards defining environmental damage and the framework for preventing and remediating such damage from the oil and gas industry within UK legislation
 - c. Extend the ecosystem approach from the Fisheries Act (2020) to cover all forms of development assessment within the MPA Network, retaining Marine Strategy Framework Regulations as guiding criteria that must be met.

ⁱ HM Treasury. 2022. The Growth Plan 2022. His Majesty's Stationary Office.