



OFFICIAL REPORT
AITHISG OIFIGEIL

Net Zero, Energy and Transport Committee

Tuesday 24 January 2023

Session 6



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NET ZERO, ENERGY AND TRANSPORT COMMITTEE

3rd Meeting 2023, Session 6

CONVENER

*Edward Mountain (Highlands and Islands) (Con)

DEPUTY CONVENER

*Fiona Hyslop (Linlithgow) (SNP)

COMMITTEE MEMBERS

*Jackie Dunbar (Aberdeen Donside) (SNP)

*Liam Kerr (North East Scotland) (Con)

*Monica Lennon (Central Scotland) (Lab)

*Ash Regan (Edinburgh Eastern) (SNP)

*Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ragne Low (Scottish Government)

Michael Matheson (Cabinet Secretary for Net Zero, Energy and Transport)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room

Scottish Parliament

Net Zero, Energy and Transport Committee

Tuesday 24 January 2023

[The Convener opened the meeting at 09:38]

Decision on Taking Business in Private

The Convener (Edward Mountain): Good morning, everyone, and welcome to the third meeting in 2023 of the Net Zero, Energy and Transport Committee. I am sorry for the slight delay—there were problems with transport this morning.

Agenda item 1 is to decide whether to take items 3 and 4 in private. Under item 3, the committee will consider the evidence that we will hear today on the legislative consent memorandum on the Energy Bill. Under item 4, the committee will consider its work programme. Do members agree to take those items in private?

Members *indicated agreement.*

Energy Bill

09:39

The Convener: Agenda item 2 is consideration of a legislative consent memorandum on the Energy Bill. I refer members to the papers for the item.

The Energy Bill, which was introduced in the House of Lords on 6 July 2022, aims to strengthen the resilience of the United Kingdom's energy systems. A legislative consent memorandum was lodged by the Scottish Government on 28 September. It recommends that Parliament consents only to some clauses that make provisions in the devolved areas and that it withholds consent for others.

Today, we will hear from the Cabinet Secretary for Net Zero, Energy and Transport, Michael Matheson, and discuss in more detail the Scottish Government's position on the bill. I welcome you to the committee, cabinet secretary—you have been here two weeks running. I also welcome from the Scottish Government Ragne Low, deputy director, onshore electricity policy and strategic co-ordination, and Dawn Sungu, strategic co-ordination team leader.

We have about an hour for the item, but there is some flexibility. Cabinet secretary, I think that you want to make a brief opening statement. I am happy for you to go ahead with that.

The Cabinet Secretary for Net Zero, Energy and Transport (Michael Matheson): Yes, I do, convener. Good morning. The statement will be slightly longer than normal, so please bear with me as I go through the key areas that I want to set out to the committee in relation to our position on the matter.

As the convener rightly said, the Energy Bill was introduced to the House of Lords on 6 July 2022. It was set out at that time by Greg Hands. At that time, the Scottish ministers were asked to give confirmation of their consent in principle in order to begin the legislative consent process in the Scottish Parliament. The LCM was introduced to the Scottish Parliament on 28 September 2022.

Having carefully reviewed the bill, the Scottish Government recommends that Parliament give consent to some of the clauses in the bill, but not to all of them. A number of the clauses impact on devolved areas, and further clarification is needed from the UK Government, or amendments are needed from it, to ensure that the bill respects the long-established powers of the Scottish ministers and the Scottish Parliament to act in relation to matters that fall within devolved competence.

I recommend that the Scottish Parliament provide consent to certain clauses that relate to amendments to the Nuclear Installations Act 1965, market reform and consumer protection, the regulation of heat networks, and the civil nuclear sector. We have provided details on each of those clauses in the LCM.

I recommend that the Scottish Parliament withhold consent to a number of clauses. Those are set out in the LCM, and the Scottish Government is in discussions with the UK Government about further amendments or clarifications. In part 1 of the bill, which is on licensing of carbon dioxide transport and storage, an amendment has been requested that requires the Office of Gas and Electricity Markets and the secretary of state to consider Scottish statutory emissions targets in the exercise of functions related to part 1. In part 2, which is on carbon dioxide capture, storage etc and hydrogen production, an amendment has been requested to require the secretary of state to obtain consent from the Scottish ministers if regulations contain provisions that would be within devolved competence. On part 3, low-carbon heat schemes and clauses 98 to 107, the Scottish Government has requested changes to include provisions for the Scottish ministers to give consent to secondary regulations where devolved competence is touched upon. Some clauses in chapter 1 of part 7, which is on heat networks, propose that the secretary of state need only consult the Scottish ministers on devolved matters rather than seek their consent. In paragraph 33 in part 5 of schedule 16, an amendment has been requested to remove any reference to Scotland, as the relevant powers do not apply here. In relation to clause 225 in part 11 of the bill and oil and gas environmental protection, in the territorial seas adjacent to Scotland, there is a mixed picture on legislative competence, depending on the activity in question. Clauses 226(2), 226(3) and 226(4) and clause 227 appear to modify and alter devolved competence and would appear to erode extant powers held by the Scottish Parliament and ministers. The general clause 238 could affect the devolved and executively devolved functions of the Scottish Parliament and ministers.

The detailed reasons for recommending withholding consent to those clauses are set out in the LCM. At the committee's request, I also provided further information in my letter of 16 January 2023.

The UK Government introduced amendments in the House of Lords on Monday 9 January that relate to processes for habitats regulations assessments for offshore wind projects. Those clauses are part of the UK Government's offshore wind environmental improvement package, and they have been the subject of significant

engagement between UK and Scottish ministers and officials. We have real and significant concerns that those clauses, as currently drafted, could pose a risk to realising Scotland's offshore wind ambitions, and we will continue to engage closely with the UK Government to ensure that those concerns are addressed.

The Scottish Government's intention is to submit supplementary LCMs relating to the offshore wind environmental improvement package and, if necessary, for any clauses where relevant amendments have been made to the Energy Bill during its parliamentary passage.

09:45

I thank the Delegated Powers and Law Reform Committee for its further scrutiny of clause 172. As a result, the Scottish Government now recommends withholding consent to that clause. As I advised the committee by letter, that recommendation will be included in a future supplementary LCM.

I am, of course, happy to respond to any questions that the committee may have.

The Convener: Thank you, cabinet secretary.

I have a quick question about the on-going discussions. I think that you said that the Scottish Government is expecting some response by the end of the month. Do you expect that there will be a satisfactory outcome and that there might be a subsequent LCM? What are your views on that? Will you give a general indication of how that is going, cabinet secretary?

Michael Matheson: We had an indication that we would get a response to our initial concerns that I highlighted in August last year. However, I am still waiting for a response to my letter of August last year on the matter.

The Convener: I am sure that a lot has happened since then.

Michael Matheson: Since then, officials have continued to engage with officials in the UK Government. Last week, we had an indication that we would receive a response ahead of this committee appearance, but that has not materialised. We have now been advised that we are likely to get a response from the UK Government next week on the clauses that we highlighted back in August. We continue to have engagement with the UK Government, but we are still waiting for formal feedback directly from it on the issues of concern that we raised back in August.

The Convener: Okay. So there are still on-going discussions.

Mark Ruskell (Mid Scotland and Fife) (Green): Good morning to you all.

I will start with a broad question, after which we can perhaps get into the specifics of certain amendments that you are looking for. Does the Energy Bill align with the energy strategy and just transition plan? Will it help to deliver the Scottish Government's plan, or are there particular areas of divergence?

Michael Matheson: It will potentially help. As I mentioned, one area that we are still in discussions on relates to the offshore wind improvement arrangements. If we are not able to get the amendments made that we require to be made to the bill, that could have a negative impact on the roll-out of some offshore wind installations for a variety of reasons. For example, it could create confusion around the regulatory process or duplication in the system. There is therefore a risk that it could have an adverse impact on offshore wind developments and the consenting process associated with those. However, if we can get the necessary amendments made that we have been highlighting for some months now, the bill has the potential to help to improve and speed up the process.

I have been trying to take the approach with the UK Government that we have a shared endeavour in looking to take forward our offshore wind development programme in an efficient and effective way in order to meet our climate change targets. The amendments that we have proposed could help to achieve that more quickly. That is why we have been pursuing the issue with the UK Government.

At this stage, the Energy Bill has the potential to improve the situation. However, if we do not get the amendments made that we are looking for, it could have a negative impact on offshore wind projects in Scotland.

Mark Ruskell: Okay. I know that colleagues will come back to that specific point later on.

I turn to an amendment that you have requested, which relates to the need for Ofgem and the secretary of state to consider Scottish emissions targets. What is the underlying concern there?

Michael Matheson: Which particular clause are you referring to?

Mark Ruskell: I think that you are recommending withholding consent on part 1 until it is amended so that Ofgem and the secretary of state can consider Scottish emissions reductions targets.

Michael Matheson: In creating a regulatory authority through Ofgem, it is important that the regulatory process that is put in place to support

the roll-out of heat networks reflects the fact that we have statutory targets that are different from those of the UK in relation to meeting our net zero targets for 2030 and 2045. The purpose of the amendment is about ensuring that Ofgem, as the regulatory authority, has an obligation to ensure that it aligns its regulations to reflect the statutory targets that we have in Scotland. That is the primary reason behind it. The danger is that, as a regulator, Ofgem will align purely with the UK approach, which would put us in difficulty with meeting our statutory targets for 2030 and 2045.

Mark Ruskell: Are there any other areas under part 1 of the bill that relate to the requirement to have cognisance of the Scottish targets? You mentioned carbon capture and storage in your opening statement.

Michael Matheson: Part 1 concerns the licensing of carbon dioxide transport and storage. The issue is that the regulatory powers that the secretary of state is taking in that part are broad and could impact on areas of devolved competence when they are exercised. It is difficult to tell at present because of the broad nature of the powers, which is why we are looking for an amendment that would require that, if there was a desire to make any changes to areas that would have an impact on devolved competence, the Scottish ministers should give consent to that.

We have flagged up the point that the power is broad and has the potential to impact on devolved powers. The simple amendment that we are looking for is to recognise that, if the exercise of the power will impact on devolved areas, the consent of the Scottish ministers should be required.

Liam Kerr (North East Scotland) (Con): Good morning, cabinet secretary. I have a couple of questions. Throughout the bill—but particularly in part 7, which concerns heat networks—the Scottish Government looks to change the wording in the provisions from

“the Secretary of State is to consult the Scottish Ministers”

to “the Secretary of State must obtain the consent of the Scottish Ministers”.

Will you help the committee to understand what the practical implications would be of sticking with consultation over seeking consent? Is there a standard approach? Is it usual to consult, is it usual to seek consent or is there no standard?

Michael Matheson: That relates to areas that are within devolved competence. Broad powers are being taken. Provision is also made in part 7 that relates to the powers with which the national licensing authority, which will be Ofgem, will be provided. The reason that we seek an amendment to require the consent of the Scottish ministers is

that the provisions relate to devolved areas. Because broad powers are being taken and responsibilities are also being given to the networks licensing authority, there is a requirement to ensure that, if the powers are exercised in devolved areas, the consent of the Scottish ministers is sought on the matter. That is the process that I would normally expect to take place and I see no harm in putting that in the bill.

Liam Kerr: I understand the point that you are making. However, if we start from saying that the powers relate to devolved areas so there is a significant degree of seriousness to what is proposed, might there be an argument for saying that, rather than limiting consent to the Scottish ministers, the Scottish Parliament should have a role in considering any such proposals?

Michael Matheson: It will depend on whether the negative or affirmative procedure is used, but normally any regulations have to come before the Scottish Parliament. That would happen if the bill required the consent of the Scottish ministers. The Scottish ministers are accountable to the Scottish Parliament in the same way as the secretary of state has the powers but is accountable to the UK Parliament. The consent of the Parliament is not necessarily required to exercise those powers, but they are accountable to their Parliament. It is the exact same process at Westminster as it would be in Scotland.

This is not a stand-off in which we say that something is a devolved area and the UK Government cannot touch it. There are a couple of provisions in the bill that go into devolved areas but on which we are content with what is proposed. We are ensuring that, if powers are exercised in those areas through regulations that impinge upon devolved areas, there will be a requirement for consent from the Scottish ministers. That is not unusual. In my view, it is pretty standard.

As I say, it is not a case of saying that, because something is devolved, we want our consent to be sought. We have recommended that the Parliament consent to provisions in the bill with which we agree that touch on devolved areas. The bill takes powers that could be used at a later date when, at this stage, we do not know what the impact will be or whether they will align with what we want to do here in Scotland, so our consent should be required before those powers are implemented.

Liam Kerr: That argument having been made, I will go right back to the issue raised in the convener's question. You have been talking to the UK Government about the issue for about six months now. Do you have a sense that the argument is being heard and that there is

sympathy for it? Do you have any sense of how this is going to go at this stage?

Michael Matheson: I will break that into two parts. There are what I would say are the easier issues, and there are more complex issues. The more complex issues relate to the habitats regulations, which I touched on earlier. We have significant concerns about amendments that were introduced in the House of Lords on 9 January, because of their potential impact on offshore wind developments. We are having a complex and challenging discussion on that issue.

Many of the issues that I set out in the LCM are, in my view, broadly quite straightforward. There is an issue about moving from a requirement to consult to a requirement for consent, and there is an issue about making sure that our statutory targets are taken into account when Ofgem, as the regulator, carries out any of its regulatory functions. Those are in my view largely straightforward issues. The much more complex area is to do with the habitats regulations, and that is still quite a detailed discussion.

If you are asking whether the process has been straightforward, to be frank, no, it has not—it has been really quite challenging, even in what I think are the straightforward areas. There are reasons for that. You will be aware that, during the autumn, there were changes at ministerial level in the UK Government. The fact that we still have an outstanding letter from August that has not been responded to is, I think, a reflection of the issues on the UK Government side. Now that ministers are in place, we should be able to get those issues progressed. However, there is still a long way to go on the habitats regulations issue, which needs to be addressed.

Liam Kerr: I am grateful for those answers.

Jackie Dunbar (Aberdeen Donside) (SNP): Good morning, cabinet secretary. The Scottish Government has recommended that consent be withheld from what was schedule 15 because, although it does not extend to Scotland, there is a definition of "road" in paragraph 33 of part 5 that would apply to Scotland. What are your views on the practical concerns about that schedule as drafted?

Michael Matheson: The issue is that we already have provision in other legislation to deal with issues around roadworks and so on. We have a statutory process for that. The provision in that schedule to the bill is not required in Scotland, and it runs the risk of creating uncertainty for applicants with regard to how they would obtain certain provisions, because there would be competing bits of legislation. In our view, that would also go against the better regulation agenda, under which we are all meant to be

operating. That is why we have requested that Scotland be removed from that particular provision.

Jackie Dunbar: So it is just going to cause confusion.

Michael Matheson: It is just going to cause confusion, because there would be competing bits of legislation. We already have legislative provision in that area.

It is worth keeping in mind that our Heat Networks (Scotland) Bill came along after the UK legislation on that. As our legislation was developed, we were able to learn from some of the challenges that there have been with the heat networks legislation in England. I did not take that bill through Parliament, but I know that that was one of the key issues that was considered at the time. That is why there are provisions in the bill that we do not require—it is because we have already made provision for those issues.

I might be wrong, but I suspect that, in the Energy Bill, the UK Government is trying to correct some of the issues that there have been with its heat networks legislation.

Jackie Dunbar: Thank you.

Monica Lennon (Central Scotland) (Lab): Good morning. I want to ask about the offshore wind environmental improvement package, which has been mentioned a couple of times. Is the Scottish Government content with the actions that are being planned by the UK Government to reduce the consent periods for offshore wind projects that are being adopted as part of the offshore wind environmental improvement package?

10:00

Michael Matheson: We continue to have major concerns about the amendments that have been lodged so far. Those amendments were lodged only on 9 January and we are still going through their potential implications. Although they could have a limited positive impact in some areas, as things stand, there is still a significant risk that the bill could have a negative impact in slowing down the process, as a result of the existence of different consenting processes at Scottish and UK Government levels.

In addition, there is a clause that gives the secretary of state the discretion to operate a marine recovery fund, which would apply to waters out to 200 nautical miles. It is unclear how that would operate. If it were to operate on a UK-wide basis, projects that were being taken forward in waters outwith Scotland's waters could potentially use the fund in Scottish waters to offset or mitigate activities in waters outwith Scotland's waters. That

could end up creating a range of competing demands and challenges, which would lead to an extremely complex situation that would cause a significant level of anxiety in the industry.

We have a range of significant concerns. For example, the provisions of the bill do not maintain the responsibility that the Scottish ministers currently have for habitats regulations assessments of offshore wind projects in the Scottish offshore wind region, which is the area between 12 nautical miles and 200 nautical miles from Scotland's coast. At the moment, that is the responsibility of the Scottish ministers, but it appears that, under the bill, that will no longer be the case. It is unclear how that will be taken forward. It would appear that the bill might be seeking to dilute the current licensing and consenting responsibilities that we have in relation to Scottish waters.

A small positive aspect is the fact that it is recognised that, within Scottish inshore waters—those waters up to 12 nautical miles from the coastline—that is the responsibility of Scottish ministers. However, the Scottish ministers also have that responsibility in relation to the waters between 12 nautical miles and 200 nautical miles from Scotland's coastline. How the idea has been arrived at that there is a distinction between those two areas of water in that respect is beyond us.

There is also a provision that says that the Scottish ministers' powers to adopt any new HRA regulations in relation to the Scottish inshore region would be subject to

“qualifying Secretary of State functions”.

We have absolutely no idea what that means or what the implications of that would be. Does that reflect a view that the secretary of state should be able to override decisions that the Scottish ministers make in such areas, which are areas of devolved competence? There is considerable uncertainty and confusion around that, which runs the risk of causing delay and complications in the consenting system when, in fact, we are trying to speed up and improve that system.

Monica Lennon: Thank you. We all want to have clarity.

I read a note of a meeting of the interministerial group for environment, food and rural affairs that took place on 5 December, at which the Cabinet Secretary for Rural Affairs and Islands, Mairi Gougeon, and the Minister for Green Skills, Circular Economy and Biodiversity, Lorna Slater, were representing the Scottish Government. The note is on the UK Government website and it is written from that perspective, but it sounds quite positive or constructive. It says:

“Devolved government ministers set out the importance of delivering the provisions in way that supports our shared

offshore wind ambition whilst respecting devolution. Defra minister agreed that there is a need to work with devolved governments to ... achieve our mutual objectives.”

Are you aware of whether the concerns that you have raised were discussed at that meeting on 5 December?

Michael Matheson: Yes, they were. They have been discussed at many meetings, but progress has not been made in addressing the issues.

Monica Lennon: Are those meetings just nice chats or do you get into the detail at them?

Michael Matheson: The UK Government is in absolutely no doubt about the detail. When it comes to issues around the habitats regulations and the offshore consenting arrangements, there are broadly two routes that can be taken. Although some of the legislation under which consenting is taken forward is reserved, it is executively devolved to the Scottish ministers and the Scottish Parliament to consider, which means that the power to legislate in those areas is given to the Scottish Parliament.

If the UK Government is not minded to do that it can create regulation-making powers that allow Scottish ministers and the Scottish Parliament to consider making regulations in those areas, which would allow us to effect change to reflect the adaptations that we want to make in our offshore wind consenting arrangements and our habitat regulation assessments. We have set out such issues in detail to the UK Government, but we have not seen progress on addressing them.

Monica Lennon: I think that people in Scotland will be wondering what that could mean for ScotWind and for a potential ScotWind 2. What is the Scottish Government’s view on that? Have there been discussions with stakeholders in Scotland on the ScotWind agenda?

Michael Matheson: As I mentioned, it could create confusion. I also think that it could create instability in the system, because there will still be devolved areas that the improvement package does not touch upon, which will create competing demand. There are areas that are presently consented on and managed by the Scottish Government, through agencies such as Marine Scotland, where the UK Government can say that it is taking control of matters instead. That is a dilution of the powers that the Scottish Parliament and the Scottish ministers have in those areas of consent.

It could result in competing challenge from the UK Government’s approach to aspects of consenting and how that impacts on other areas of devolved policy, which might involve marine environmental issues. From the discussions that we have had with the sector, I think that there is anxiety that that will create confusion and

competing interests, which we try to avoid. There is a clear way to address that, which is to continue with the powers that we presently have, but also to have the scope to make regulatory changes to adapt them to reflect the changing demand that we face.

You mentioned ScotWind. The other aspect relating to offshore wind development is that ScotWind is of a completely different scale from what is happening in other parts of the UK. ScotWind, at nearly 28GW, is way beyond anything that is being proposed in any other part of the UK. It is important that we have a consenting regime that is fit for purpose and reflects the different needs and competing interests—from those of our fishing communities through to those of our island communities—that we have to manage. The danger is that we end up with a consenting system that does not reflect that and we find ourselves with fewer powers than we have at present on consenting on such issues.

Monica Lennon: Scottish Renewables’ position is that it supports the Scottish Government’s LCM recommending that consent be withheld for selected sections of the bill on the basis that it supports

“growing Scotland’s renewable energy sector and sustaining its position at the forefront of the global clean energy industry”.

Given what both you and Scottish Renewables have said, is the Scottish Government’s position that the bill does not achieve that?

Michael Matheson: In the present form it does not. We need to be able to adapt our consenting regime to deal with the scale of ScotWind and other offshore wind developments, because of the various competing needs that we have to address in our marine environment.

However, in some of the aspects that we need to change in order to do that, the regulations are based on legislation that is reserved to the UK Government and that we use executive powers to exercise. In order to improve that process, we need to have the powers to change those regulations fundamentally, if not the powers to make primary legislation.

That is why I have set out that there are two routes that we could go down. Either the power could be devolved or we could be given the regulation-making powers so that the Scottish Parliament would then be responsible for scrutinising those and for managing the process. To date, we have not been able to make the progress on those issues that we had hoped for. I can assure the committee that there has been significant engagement not only within the industry but across ministerial portfolios to try to find a way to address the issue properly. That goes back to

your opening point and the minute that you mentioned.

There is a shared agenda here. The danger is that the legislation as drafted could have the opposite effect in Scotland from what its purpose was originally intended to be. That is why we have set out how we can make sure that we deliver on the shared agenda and on a fit-for-purpose consenting process for managing projects such as ScotWind and some of the big offshore renewable projects that are coming along in the next couple of years.

Monica Lennon: That is helpful. Thank you.

Fiona Hyslop (Linlithgow) (SNP): Can you confirm that the issue for both Governments is how we can effectively reduce the consenting period but also improve the process and have certainty for the industry to ensure that the developments take place as planned? If you have to come back to the committee with a supplementary LCM, is that likely to be the area of concern?

Michael Matheson: Absolutely. That is key. Very often, the mitigation measures that have to be implemented through the consenting process are based on where the development is taking place, or they are close by. Given the scale of some of the developments, it may not be possible to achieve that, and mitigations may have to take place in other parts of the marine environment or our coastline. We have set out a range of ways in which we could achieve that and allow developments to be taken forward in a timely, efficient and effective way. If we are unable to do that, the reality will be that some of the larger developments will be significantly constrained, and we will end up having to mitigate in a way that will not be pragmatic.

There is a pathway through this, but we have not been able to get agreement with the UK Government to ensure that the pathway is very clear. As we are picking up from industry, the danger is now that there will be confusion and delay in the consenting process and that we will not be able to manage it in a way that reflects the specific challenges that we have, given the scale of the projects here in Scotland. We need to be in a position where we can adapt to those challenges, which are not reflected in what is happening in other parts of the UK. The scale of what we are doing is of a different magnitude.

Fiona Hyslop: I want to explore whether you can help the committee to understand any potential relationship between the UK Government's Levelling-up and Regeneration Bill and what might come through the Energy Bill in relation to mitigation and environmental aspects.

I perfectly understand that we want to see biodiversity mitigation and peatland restoration in relation to onshore developments. With offshore developments, there will clearly be a biodiversity impact from major developments, and we will want to make sure that there are mitigations. Environmental law and mitigations are devolved competences of this Parliament.

We published our report on the UK Levelling-up and Regeneration Bill at the end of December, and one of the concerns that we noted was that the new system would mean that the Secretary of State for Environment, Food and Rural Affairs in the UK Government would not have to consult the Scottish Parliament or the Scottish Government on mitigation in relation to cross-border areas, which could clearly include the sea.

Mitigation for environmental issues would therefore be under the auspices of the Secretary of State for Environment, Food and Rural Affairs, which could have a major impact. For example, as part of our mitigations, we might want to develop seaweed farms or do something in relation to our bird populations in particular. However, there would be no responsibility, accountability or planning and funding control from the Scottish Government. Those things would transfer to the Secretary of State for Environment, Food and Rural Affairs.

If I have got that wrong, please let me know, but I am concerned about the interaction between the two bills.

Michael Matheson: You are correct. There is a significant interaction, particularly around the habitat regulation assessment aspect. I will give a practical example in relation to a marine recovery fund operating at a UK level. We could have an offshore wind farm being developed in the Celtic Seas, which is a project that has taken off in Wales, but the actual mitigations could be applied in a fishery in Scotland because of the negative impact that it would have on, say, a certain type of bird life. It might be said that closing a certain fishery in Scottish waters could be classed as a mitigation to support that.

The challenge is that projects in Scotland may need mitigations that involve the closure of certain fisheries, which they would then not have access to. The other aspect is that the closure of a fishery—I am just using that as an example—could have a significant economic impact on a community. The Scottish Government would be largely responsible for addressing that despite the fact that it was not responsible for the decision to close the fishery as a mitigation for an offshore wind farm being located somewhere else in UK waters.

10:15

The Convener: Will you clarify that, cabinet secretary? Could it not also work the other way round? Something could be developed up here that might have an environmental impact that was then translated to another part of the United Kingdom. Surely it could work both ways.

Michael Matheson: Yes, potentially. However, the difference is that the scale of what is being taken forward in Scotland is of a different magnitude to what is happening in the rest of the UK's waters. It is worth keeping in mind that 62 per cent of the UK's waters are Scottish waters.

The Convener: Might it therefore be more important to have the ability to offset that across the whole of the United Kingdom rather than just in Scottish waters, or is that not the case?

Michael Matheson: That is not the case. It is quite the opposite. The vast majority of the mitigations will probably fall within Scottish waters or the Scottish coastline because of the scale of what we are looking to do with offshore wind. What is projected for the waters around England is on a much smaller scale than what is proposed in Scottish waters. The danger is that smaller projects in other parts of the UK will start to take up mitigation measures for large-scale projects in Scottish waters, which will then constrain them.

We have said that any marine mitigation fund in Scotland should be the responsibility of Scottish ministers, who report to the Scottish Parliament. However, even if I was given the power to take up mitigation measures in other parts of the UK, I have no doubt that people would quickly say that that was not the right thing to do, because I would not be responsible for the wider impact on fishing communities. That would have to be decided on by UK ministers, but—

The Convener: You could consult them to see whether that would work.

Michael Matheson: To be honest with you, I would not want to consult them. If I place the responsibility on them, it is my responsibility to get their consent to it. The problem is that that is not what is proposed. The proposal is that these things be decided by quite a centralised system based in Whitehall. That does not necessarily reflect the scale of what we are looking to take forward here in Scotland or the impact that some of the mitigation measures might have on communities or certain industries. The responsibility for the impact of that would then fall to Scottish ministers.

Fiona Hyslop: If I may, I will continue my questions on that area. You are suggesting that there should be consent both ways with regard to the environmental impact and mitigations as a

result of the Energy Bill but that the implications for Scotland are clearly far bigger because of the scale of the operations in the ScotWind programme, and potentially ScotWind 2.

Is that what you will seek as regards changes to the Energy Bill—to ensure that consent will work both ways? If so, is any action required with regard to the interaction with the Levelling-up and Regeneration Bill, which I mentioned earlier and which the UK Government is pursuing? Currently, there is only consultation with Scottish ministers.

Michael Matheson: Ragne Low might want to say more about the interaction with that other piece of legislation, because that is part of the wider engagement that we are having with the UK Government on the matter.

With regard to how any marine recovery fund might operate, we are moving into new territory and we must try to address a lot of competing demands. It is a combination of trying to achieve our desired outcome of offshore renewables potential and addressing the impact that that has on our marine environment and those who are dependent on it—our fishing communities and seabird life, which Scotland also has a major role in supporting at a European level.

The idea of the marine recovery fund is to take a balanced approach to mitigate some of the impacts of large-scale offshore wind developments on our marine environment. Our view is that, for that system to operate effectively in Scotland, decisions on any mitigations related to consenting for offshore wind developments should be for Scottish ministers to make, as is the case at the moment.

If there was a view that the system should operate at a UK-wide level, a process would be needed whereby Scottish ministers would be asked to consent to changes that came about from a marine recovery fund being applied in Scotland in order to offset the impact of a development outwith Scotland. That would have to be weighed against the potential impact on other projects in offshore Scottish waters.

The question is how we manage all those competing demands. If that system is applied, what impact will it have on communities, industries and bird life in Scotland? How do we balance that out against all the other projects that will probably end up needing mitigation measures as well? That is the challenge. The process would require Scottish ministers' consents, and the system would have to be balanced so that we can properly assess it. At this stage, one of the major issues is the lack of detail on or understanding of exactly how that system would operate.

Ragne Low might want to say a wee bit about interaction—

The Convener: We have quite a few more questions, cabinet secretary. Mark Ruskell has a supplementary question on that point, which might also prompt you to answer the next question.

Mark Ruskell: Yes, and it might well feed into what Ragne Low might want to talk about. I want to probe a little further on the changing nature of environmental assessments. Does the Levelling-up and Regeneration Bill and its proposal to move to environmental objectives rather than follow European standards and processes of environmental and habitats regulation assessments form part of the concern here? With a shift in environmental assessments, could the answer to mitigation end up being different according to whether the secretary of state defines particular environmental objectives?

Michael Matheson: The fundamental difference is that the UK Government views the habitat regulation aspect for energy purposes—I think that this is correct—as reserved, which is a change. The UK Government says that that aspect is for energy production purposes, which is a reserved matter. Our view is that the habitat regulation assessments, whether for energy production or anything else, are to do with environmental aspects, which are devolved matters over which we have competence.

Part of our discussions with the UK Government has been about trying to get recognition that what is important is not the individual purpose of some of those habitat regulations, but their fundamental purpose, which is the management of our marine environment and effective marine stewardship.

Do you want to say a wee bit more on our process around levelling up, Ragne?

Ragne Low (Scottish Government): With regard to the relationship between the two bills, as has been said, some of the principal issues are the same. The issues that we have around devolved competence are similar. However, the UK Government is using the Energy Bill as the vehicle through which to introduce changes to the habitats regulation assessment process for offshore wind projects, so that is where our focus is with regard to this work. We can perhaps come back to you if you would like to further explore particular details around the relationship between the two bills.

The Convener: I think that Mark Ruskell has the next question as well.

Mark Ruskell: I have finished, convener.

The Convener: Okay. We will return to Fiona Hyslop.

Fiona Hyslop: How do you future proof for legislation and changes that will happen? You mentioned the potential issues around heat

networks. Does the UK Energy Bill present a wider risk to devolved powers or is it likely to limit future actions of Scottish ministers and the Scottish Parliament, particularly on energy?

Michael Matheson: Our position is to maintain the powers that we have and to consider trying to create mechanisms that will help us to address some of the challenges that we know we will face around things such as large-scale offshore wind developments. We are looking to protect and maintain the existing devolved powers and competence of the Scottish Parliament and Scottish ministers on the consenting regime.

We also recognise that changes will need to take place in order to accommodate and manage some of the challenges around large-scale offshore wind developments. That is why we have been flagging up to the UK Government that it could devolve the primary legislation that deals with some of that or, if not, create regulation-making functions that would allow the Scottish ministers and the Scottish Parliament to adapt to some of the challenges that we will face in the years ahead.

My view on your challenge about future proofing is that having a regulatory process allows us to have the flexibility to change and adapt to some of the challenges as we go forward. The danger is that, if we do not have that, it will create confusion, difficulties and instability in the process and create a longer and more challenging process than is otherwise necessary. The system could be changed to make it much more efficient.

Fiona Hyslop: You say that the immediate issue relates to the offshore situation. Do the wider aspects of the Energy Bill, such as the provisions on hydrogen or carbon capture, give rise to any potential issues with onshore environmental aspects? I suppose that we need to consider the onshore environmental aspects of any developments that might take place and the mitigations for those. I refer, for example, to the Acorn project and work at Grangemouth.

Michael Matheson: Some of the powers that are created in the bill and are being taken by UK ministers, such as those on hydrogen and carbon capture and storage, are broad. In our view, with the regulation-making functions that UK ministers are creating for themselves, those powers are likely to impinge on devolved areas at some point. That is why we are saying that, if a power is going to impact on devolved areas, we need to ensure that there is a consenting process for agreement to that.

We are trying to ensure that there is a move from consultation to consent, because those provisions relate to areas in which we already have powers that we would expect to require the

consent of the Scottish ministers and the Scottish Parliament. That should be reflected in the broad powers that are being created.

The bill does not contain so much on onshore matters. There are some issues to do with consenting on onshore developments. Most of that is done through the planning legislation in Scotland. As you are aware, some aspects of consenting under the electricity legislation could be improved, and we are engaging with the UK Government on them. They are mainly to do with large interconnectors. I am hopeful that we will be able to get some sort of resolution on those matters, but I do not think that that is addressed in the bill.

Ragne Low: It is not.

The Convener: Liam Kerr has a quick question.

Liam Kerr: It follows on from the deputy convener's question and takes you back to what I asked at the start, cabinet secretary. We talked about looking to change from a requirement merely to consult the Scottish ministers to one to seek their consent. I think that I heard that that would be the more usual and, perhaps, more appropriate way to go. If that is right, do you have a view on how, given the number of times that that comes up in the process, we, you or the UK Government could identify such issues at an earlier stage of the drafting so that we do not get to this point six months on, say, from when the matter is initially raised but, by this stage, we are arguing about more substantive matters, such as those that you detailed?

Michael Matheson: That is a good point. The most effective way to address that would have been earlier sharing of a draft of the bill. We received a copy of the bill only the day before it was published and less than 24 hours before it was introduced to Parliament. We have consistently flagged up to the UK Government that earlier sharing of draft legislation allows us to feed into the process at an earlier stage. That would be the most effective way to avoid getting into such situations.

We were in discussions with the UK Government before the bill's publication, but those discussions were based on our having no details of what was going to be in the bill. The sharing of an earlier draft would be the most effective way to deal with that issue, Mr Kerr.

The Convener: Your point about the fact that you got the bill the day before it was introduced is interesting to me, cabinet secretary. It would help me to understand, and it might help the committee, if you could share with us the letter of 9 August that you sent to the UK Government. I cannot see it online. Perhaps I have missed it, but perhaps you could send it to us so that we have

an idea of the substantive questions that you raised at that stage that have not been answered.

I thank you and your officials for your time and for coming to the committee.

That concludes the public part of our meeting, so we will move into private session.

10:30

Meeting continued in private until 11:52.

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