

Citizen Participation and Public Petitions Committee

2nd Meeting, 2022 (Session 6), Wednesday 2
February 2022

PE1895: Mandatory accountability
for NatureScot's decision making procedures

Note by the Clerk

Lodged 23 August 2021

Petitioner Gary Wall

**Petition
summary** Calling on the Scottish Parliament to urge the Scottish Government to make it mandatory for NatureScot to explain its conservation objectives in decision making within the framework of the Scottish Regulators Strategic Code of Practice and Scottish Government's guidance, 'Right First Time'.

Webpage <https://petitions.parliament.scot/petitions/PE1895>

Introduction

1. The Committee last considered this petition at its meeting on [3 November 2021](#). At that meeting, the Committee agreed to write to the Scottish Government.
2. A summary of past consideration of the petition and responses to information requests are provided for the Committee's consideration.

Background

3. During its consideration of this petition, the Committee received 4 written submissions.
4. In its initial response to the petition, the Scottish Government stated that NatureScot works with the Joint Nature Conservation Committee and equivalent bodies in England, Wales, and Northern Ireland to ensure a

consistent approach to nature conservation throughout the United Kingdom, including in relation to fulfilling its international obligations.

5. The original Scottish Government submission noted that licensing decisions are delegated under the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats, &c.) Regulations 1994 to SNH (Scottish Natural Heritage, now rebranded as NatureScot) in 2011. It stated that NatureScot assesses licence applications against three licensing tests:
 - Test 1: there must be a legal purpose
 - Test 2: there must be no satisfactory alternative
 - Test 3: the proposed action must not be detrimental to the maintenance of the species at 'favourable conservation status' in relation to European Protected Species, or conservation and/or welfare in relation to other birds, plants and animals.
6. In the refusal process, the submission noted that refusals and novel/contentious licensing cases are first discussed with the Licensing Manager, who will also inform the Unit Manager. Applicants who have had applications refused must be clearly informed of the reasons for refusal.
7. The petitioner's previous submission highlighted the terminology used by the Scottish Government in relation to 'Test 2', noting that he believes it to be incorrect and in conflict with case law. The petitioner stated that 'to determine what constitutes a 'satisfactory solution', the authority must take into account the 'objective' of the legislation and understand the case law that defines it'.

Scottish Government submission

8. The Committee wrote to the Scottish Government seeking information on the application of 'Test 2', including whether assessing licence applications on the basis of there being 'no satisfactory alternative', as opposed to 'no other satisfactory solution', is likely to lead to a different outcome.
9. The Scottish Government sought advice from NatureScot on this issue and stated:

"Whilst there are differences in the strict protection of species under the Habitats Directive compared to the protection given to birds under the Birds Directive, the terms 'no satisfactory alternative' and 'no other satisfactory solution' are considered to be analogous. This view is supported by the European Commission's recently updated guidance on the strict protection of species, which refers to Birds Directive case law for the interpretation of Test 2."

Petitioner submission

10. In his most recent submission of 22 January 2022, the petitioner references the judicial review of *McMorn v Natural England* as an example of how licensing should be applied under EU guidance. He states that it details 'proportionality, discrimination between species being unlawful and the fact that public opinion should not be part of licensing decisions.'
11. The petitioner notes his view that NatureScot favour alternatives that don't address 'the need' and do so 'without a clear conservation objective'. It is highlighted that although NatureScot reference EU Commission guidance, the rejections he has received have been on the basis of actions which are not challenged by the EU Commission in other countries.
12. The petitioner states that accountability is 'especially important given the high degree of autonomy NatureScot is privileged with'.
13. The Scottish Government's Biodiversity Strategy's reference to the importance of objectives is also highlighted by the petitioner. He states that, in his experience, NatureScot have not provided an objective when refusing a license application. He states that the 'Scottish Government recognise that "proportionality" is one of the foundations of regulation and yet in ten years of license refusals it has never been explained to me what factors have been considered in relation to "proportionality"'.
14. The petitioner concludes by stating that 'at least a citizen should be able to expect clarity in what the conservation objective is in refusing a license'.

Action

The Committee is invited to consider what action it wishes to take.

Clerk to the Committee

Annexe

The following submissions are circulated in connection with consideration of the petition at this meeting –

- [PE1895/C: Scottish Government submission of 07 December 2021](#)
- [PE1895/D: Petitioner submission of 22 January 2022](#)

All written submissions received on the petition can be viewed on the petition on the [petition webpage](#).