

First Minister

**CC Deputy First Minister
Minister for Green Skills, Circular Economy and Biodiversity**

CLOSURE OF THE COMMERCIAL SANDEEL FISHERY IN SCOTTISH WATERS

Purpose

1. To reach a collective government decision on whether to consult on a closure of the commercial sandeel fishery in Scottish waters for the purpose of providing wider ecosystem benefits to the marine environment, which could also deliver potential benefits to seabirds impacted by Highly Pathogenic Avian Influenza (HPAI). It should be noted that the UK Government will be consulting on potential spatial closures within English waters for the sandeel fishery.
2. This is a longstanding issue but its resolution has become more urgent as a result of both the HPAI outbreak and a Defra consultation currently planned for the week commencing 27 February 2023. A meeting has been scheduled in your calendar for 8th February to discuss this advice, with a view to reaching a decision within these timescales.

Context and Issues

3. In August 2022 we received advice from officials in relation to future management measures for the sandeel fishery in Scottish waters (for ecosystem considerations) in the context of the offshore wind development at Berwick Bank. In response, the Cabinet Secretary for Rural Affairs and Islands requested further advice on the impacts of HPAI across seabird species and whether early closure of the sandeel fishery could mitigate these impacts.
4. This advice, which was shared with us on 15 December 2022, concluded that [REDACTED] [REDACTED] [REDACTED] [REDACTED] Closure would also deliver benefits to the wider marine ecosystem.
5. Immediately following receipt of this advice, the UK Government stated their intention to consult later this month on potential closures of the sandeel fishery within English waters on the grounds of the wider ecosystem benefits that a closure would bring. Defra believe there is a sufficiently strong evidence base to justify closing the fishery on wider ecosystem grounds and intend to recommend closure in their consultation. This will place the spotlight on the Scottish Government's position, with RSPB Scotland (who are aware of the UK Government's plans) indicating that they will go public in placing pressure on Scottish Ministers to follow a similar stance if we do not proactively state our position. It should also be noted that Willie Rennie MSP has recently written to the Cabinet Secretary for Rural Affairs and Islands seeking an update on whether

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the Scottish Government will be closing Scottish waters to sandeel fishing as part of a four-nation approach.

The commercial sandeel fishery in Scottish waters

6. Given the importance of sandeel to the wider ecosystem and the subsequent benefit provided by the species in aiding long-term sustainability and resilience of the marine environment, it remains an over-arching and long-held Scottish Government position not to support fishing for sandeel in Scottish waters, which is reflected in Scotland's Fisheries Management Strategy. This position was emphasised in June 2021 when the Cabinet Secretary for Rural Affairs and Islands committed in Parliament to considering as a matter of urgency what management measures could be put in place to better manage the North Sea sandeel fisheries in Scottish waters.
7. In 2021, Scottish Government officials worked closely with UK counterparts on a public call for evidence to better inform considerations on the future management of sandeels in UK waters. A wide range of stakeholders responded to the call for evidence to include eNGOs, representatives of UK fishers, representatives of Norwegian and Danish fishers, academics, the Joint Nature Conservation Committee (a statutory body) and renewable energy companies. In the summary of responses, one of the main themes raised was an acknowledgement that sandeels have a high ecological value to the entire marine ecosystem. The summary of responses noted that the majority of responses were in favour of implementing new management measures for sandeel stocks. It was noted that decisions on the introduction of any new management measures, including any consultation on potential measures, would take place following the conclusion of sandeel TAC setting with the EU for 2022.
8. Sandeel is a jointly managed stock between the UK and the EU. Under the Trade and Cooperation Agreement (TCA), and during a transition period lasting until 30 June 2026, the UK and the EU have full mutual access to their respective EEZs (i.e., 12 – 200 nautical miles); as well as access to specific English, Welsh and Channel Island waters in the 6-12 nautical mile area. Sandeel is an important fishery to some EU member states, in particular Denmark, who regularly fish the stock in UK waters in May and June. In the case of UK vessels, historically, the stock has been targeted primarily by one Scottish vessel, although no quota was allocated to UK vessels for sandeels in 2021 or in 2022, and a major sandeel fishing area in the North Sea has been closed to UK and EU vessels, except for a limited monitoring fishery in some years, since 2000 (see Figure 1).
9. The UK Government's decision¹ not to allocate sandeel quota to UK vessels (in the context of EU vessels continuing to do so) is subject to an ongoing Judicial Review (JR) brought forward by a Scottish vessel against the Secretary of State (SoS), with the case due to be heard in court on 9 February 2023. The UK Government are expecting to successfully defend the case, although the sufficiency of the evidence base for closure of the sandeel fishery is likely to be

¹ Following agreement at December Council on the level of TACs, Defra allocates shares of the UK's quotas to each of the UK's four Fisheries Administrations. The Fisheries Act 2020 [Fisheries Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2020/12)

scrutinised. However, it is recommended that the decision to consult on a closure of the commercial sandeel fishery in Scottish waters is considered now, without waiting on the outcome of this JR – see legal considerations below.

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10. Independent of the court case, following on from the call for evidence as discussed at paragraph 7 above, Defra have stated their intention to consult on possible closures of the commercial sandeel fishery within English waters, for the purpose of environmental protection and wider ecosystem resilience, in the week commencing 27 February. Depending on the outcome of the consultation, our understanding is that Defra could move to close the fishery within English waters by this summer, although noting that the fishery occurs between May and July it is more likely that any such closure would not come into effect until the 2024 fishery.
11. **It is important that by the time of the consultation we have a clear policy position on our intentions with regard to the Scottish fishery, given that we will come under pressure to state our position as soon as the Defra consultation is published.**

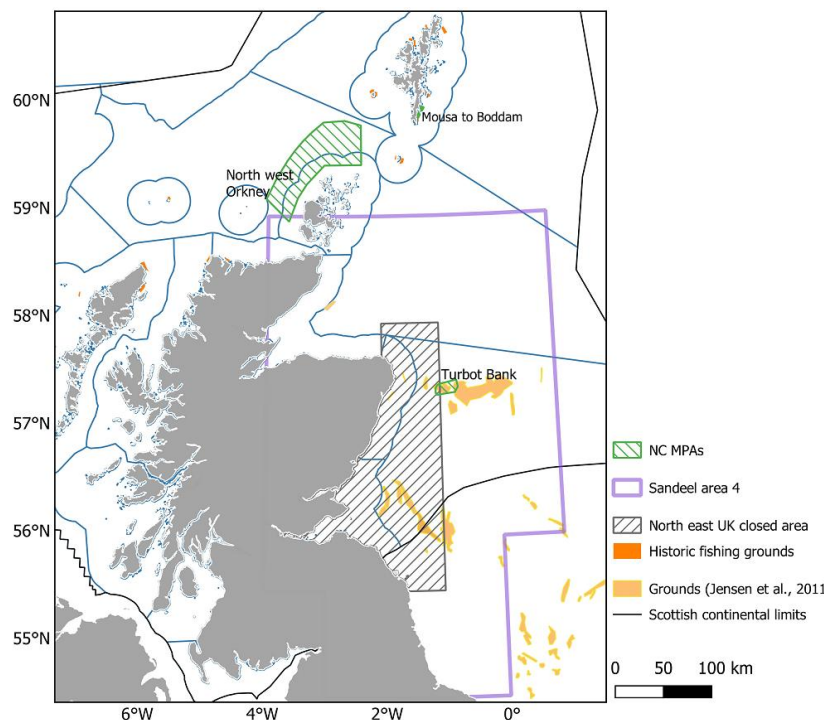


Figure 1. The existing north east UK area closed to sandeel fisheries and the various spatial management measures for sandeel within Scottish waters. (Reproduced from a Case Study: Sandeels in Scottish Waters)

Seabirds and Highly Pathogenic Avian Influenza

12. Scotland is home to nationally and internationally important seabird populations, holding almost 100% of the GB breeding population (and around 60% of the world population) of great skua and around 80% of the GB breeding population (and nearly 50% of the world population) of northern gannet. However, in recent

decades, many seabird species have shown large declines (except for gannets and some colonies of great skua), with an assessment carried out as part of the UK Marine Strategy concluding in 2019 that breeding seabird populations had not achieved Good Environment Status (GES) in UK waters. The outbreak of HPAI therefore comes at a particularly challenging time for Scottish seabird populations.

13. RSPB Scotland have made a clear call for the sandeel fishery to be closed urgently to mitigate for the impacts of HPAI. This follows the publication of a detailed paper in June 2021 (so prior to the HPAI outbreak) in which RSPB Scotland set out its case in support of a closure of the sandeel fishery in UK waters for the benefit of the marine eco-system and the seabirds that rely on it. Between 4 April and 11 September 2022, approximately 20,500 dead seabirds across 160 locations in Scotland were reported to NatureScot. Whilst only a very small proportion were tested for HPAI, the cause of death was assumed to be attributed to HPAI. These numbers, which are likely to represent only a small proportion of the total number of seabirds that died during 2022, are far in excess of mortality seen during 2021 where relatively low levels of HPAI were reported in seabirds. Furthermore, seabirds are long lived species with approximately 90% of adults surviving each year. However, the HPAI adult mortality rate for some species (e.g. Great Skua during 2022) was as high as 70%, suggesting a seven-fold increase in adult mortality. Due to seabirds' low reproductive rate it is likely to take many years for these seabird populations to recover from such impacts (NatureScot's provisional HPAI impact assessment is attached at Annex A).
14. Subject to available resources, targeted counts will take place at key seabird colonies around Scotland in the 2023 breeding season, which will help to quantify any population level impacts of HPAI. While these counts (which should become available late 2023/early 2024) will help to quantify impacts of HPAI on species and colonies, they will not alter the current conclusion or overall state of knowledge, based on the evidence gathered during 2022, that HPAI has resulted in substantial mortality of some seabird species. Delaying current decision making until all colony count evidence is obtained is therefore not necessary nor desirable.
15. Scotland's seabird populations continue to face a range of pressures including climate change, onshore/offshore developments, bycatch/entanglement, reduced prey availability, pollution, predation by invasive terrestrial mammals and disturbance, meaning that multiple variables are acting on those populations. Any potential mitigating action should therefore be considered in the broader context of the need to act across these wide-ranging pressures and build resilience in Scotland's seabird populations. Reducing fishing mortality on seabird prey species, specifically sandeels, is considered one of a limited number of mitigating actions that could potentially deliver benefits to seabirds as well as the wider marine ecosystem.

Option to close the sandeel fishery in Scottish waters

16. Any closure of the sandeel fishery in Scottish waters would involve extending the current closed area in the North Sea by way of a general prohibition on fishing for

sandeels by all vessels, including EU vessels. As noted previously, UK vessels are not allocated quota from the UK for this fishery, so the primary impact of any closure would be on Danish vessels, which hold 96% of the EU sandeel quota (on average 128,546 tonnes from 2020 to 2022), with 35% of this being allocated to areas almost entirely within UK (and primarily Scottish) waters.

Rationale for closure of the sandeel fishery

17. The rationale for closure of the sandeel fishery in Scottish waters would be on the grounds of the wider environmental and ecosystem benefits that sandeels bring, acknowledging the potential benefits that this in turn could bring to seabirds impacted by HPAI.
18. Sandeels play an important role in the North Sea food web as a key resource for marine mammals, seabirds and predatory fish. Declines in sandeel abundance can negatively impact the survival and reproduction of ecologically important species, therefore closure of the sandeel fishery has the potential to bring about wider ecosystem benefits to a range of species as well as improving resilience to changes in the marine environment. For example, restricting sandeel fishing (and therefore limiting this source of mortality) may lead to an increase in sandeel abundance, survival and potentially availability, thereby providing benefits to other North Sea top predators, including key whitefish species, seabirds and marine mammals. Closure of the sandeel fishery would also reduce unwanted bycatch of valuable fish stocks such as whiting, haddock and mackerel.
19. With regard to HPAI, seabirds feed on a wide range of fish, with sandeels a key prey for several seabird species especially during the breeding season. Extending the closure of the sandeel fishery therefore has the potential to bring benefits to seabirds impacted by HPAI and, to provide greater resilience to seabird populations. For example, studies have shown how breeding success in kittiwakes, common guillemots and puffins is influenced by the abundance of sandeels, with an increase of sandeels in their diet being shown to improve breeding success in these species. However, the extent to which these benefits could be realised for seabirds impacted by HPAI is unpredictable due to variation in sandeel availability driven, to a large extent, by prevailing environmental conditions including climate change. Any benefits, if realised, would not be immediate and would vary with location and species.
20. While more data can always be gathered and add to our store of knowledge concerning the environmental benefits of sandeels, it is noteworthy that this is a topic which has already been examined for decades and **further research is unlikely to change the overarching case set out in paragraph 17 that a sandeel closure will provide benefits to the wider marine environment** through increasing ecosystem resilience and as a food source for a wide range of sandeel predators. Thus, while the evidence base is not definitive (it very rarely is in the marine environment) we do not believe that it will materially improve in a way which would substantively change the basis for decision-making in the medium term.

21. The policy assessment is therefore that there is a case for closing the sandeel fishery on the grounds of wider marine ecosystem benefits, acknowledging the potential benefits that this could also bring to seabirds impacted by HPAI. This is a view which is reflected in the current position of the UK Government (supported by the Scottish Government) in not allocating sandeel quota to UK vessels, and aligns with an evidence paper commissioned by Defra for their forthcoming consultation. In the Defra paper, whilst it is acknowledged that there is a risk that environmental variation as a result of climate change could offset any benefits from closing the fishery in the UK waters of the North Sea, it is noted that a closure of the fishery could offer increased sandeel resilience at times of adverse natural conditions which would in turn benefit a wide range of sandeel predators.

Other considerations in relation to offshore wind developments

22. Closure of the sandeel fishery has been raised by developers as a future compensatory measure for offshore wind developments. There are various assessments that have been made by Government and offshore wind developers that attempt to quantify the benefits of closing the sandeel fishery - either in terms of direct benefit to seabirds that feed on sandeels or broader benefits to the wider marine ecosystem. In addition, developers have considered the benefits of a range of other colony-based actions that could also provide smaller scale compensatory measures.

23. Some developers, including SSER, take the view that closure of the sandeel fishery remains the most significant and effective action that could be taken as a compensatory measure to address the likely impact on key seabird species such as kittiwake and guillemot of proposed windfarms on the east coast of Scotland. It should also be noted that colony-based measures, which would improve the seabird habitats at the breeding colonies, are likely to be most effective if delivered together with the closure of the sandeel fishery.

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24. You will be aware that the application for the Berwick Bank consent has now been received and is currently out to consultation. This includes a case for derogating from the Habitats Regulations on the basis of securing compensation via closure of the sandeel fishery in both Scottish and English waters

[REDACTED]

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However, it should be noted that a decision by Ministers on whether to close the sandeel fishery now for the purpose of wider ecosystem benefits must be taken solely on the available evidence for that purpose. Considerations of whether the sandeel fishery closure could be an effective compensatory measure for future wind farm developments [REDACTED] should not influence the decision being made by Scottish Ministers.

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Financial and Legal Considerations

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² See the position of the RSPB (prior to avian flu) in the following publication: [rspb2021_the-case-for-stronger-regulation-of-sandeel-fisheries-in-uk-waters.pdf](#)

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Stakeholder reaction and risk

Challenge by the EU

- 43. Article 496 of the TCA provides that both the UK and EU may decide on the management measures applicable to their respective waters to achieve relevant objectives and principles (such as the conservation of marine living resources). However, there is the potential risk of a challenge from the EU (in particular Denmark), who fish the stock in UK waters.

- 44. The UK has taken and/or will take action to mitigate any challenge and minimise any harm to UK-EU relations. As set out in the TCA, if a closure of the sandeel fishery in Scottish waters was brought forward, we would ensure that the UK completes the relevant treaty notification and consultation obligations are met. This would build on the engagement the UK has already had with the EU in the annual fisheries negotiations, where we have continued to clearly state our position of not supporting the sandeel fishery, therefore any additional management measures, while not palatable to the EU, should not come as a surprise.

- 45. With regard to fisheries and EU stakeholders, the likelihood that Defra will restrict or close the sandeel fishery in English waters will add support to any similar

decision by Scottish Ministers. Furthermore, our position is strengthened by the fact that no quota has been issued to UK vessels for sandeels in 2021 or 2022, and a major sandeel fishing area in the North Sea has been closed since 2000. Although the First Minister may wish to note the ongoing JR against the SoS.

46. The UK Government's forthcoming consultation on closure of the fishery in English waters will, as previously noted, put pressure on the Scottish Government to adopt a similar stance. RSPB Scotland have made clear that in their view closure of the sandeel fishery on a UK-wide basis is an urgent priority and have indicated that they will go public in placing pressure on the Scottish Government to align with the UK Government if we do not do so proactively. There is therefore a high risk of reputational damage and potential legal challenge from the RSPB if Scottish Ministers choose not to consult on closure of the fishery in Scottish waters at this juncture.

Timings for a Scottish consultation in relation to the sandeel fishery

47. Should the collective government position be to recommend closure of the commercial sandeel fishery in Scottish waters, then this will require a consultation process. It should be noted however that we would not be able to match the timetable set by Defra for the end of February due to the various statutory assessments that are required to be completed. A consultation would therefore conclude in summer 2023, meaning that any closure would likely not be implemented until after the 2023 sandeel fishing season that occurs between May and July of each year. This would mean that any management measures would come into effect for the 2024 fishing season, although noting that the process of EU notification would commence in 2023. Any challenge from eNGOs (particularly the RSPB) could be managed through dialogue regarding our intention to do so following due process.

Recommendation

48. That you note:
- a. the contents of this submission, including the policy conclusion that there is a case for closure of the sandeel fishery now on the grounds of wider environmental and ecosystem benefits;
 - b. that the UK Government will be shortly consulting on possible closures within English waters of the sandeel fishery, and that eNGOs will be actively campaigning for a four nations closure, and
 - c. that you agree to an early meeting to agree a collective Government position, scheduled for 8th February.

Mairi Gougeon
Cabinet Secretary for Rural Affairs and Islands

Michael Matheson
Cabinet Secretary for Net Zero, Energy and Transport

Annex A – The outcomes of the risk assessment developed by NatureScot and the associated uncertainties and caveats.

Impact assessment of HPAI on breeding seabirds based on a provisional assessment of the 2022 data. Information on the species that NatureScot consider are dependent on sandeels is also included. *The most impacted species are highlighted in blue.*

Species	Min reported mortality	Impact Assessment for 2022	Significance of Scotland's seas to the species	Dependent on sandeels
Gannet	11190	Highest	High	
Great skua	2591	Highest	High	
Common guillemot	3361	Highest	High	Yes
Kittiwake	760	Highest	Medium	Yes
Terns	643			
• Arctic		Highest	High	Yes
• Common		Highest	Low	Yes
• Sandwich			Low	Yes
Large gulls	627			
• Herring		Highest	Medium	
• Lesser black backed gull		Highest	Low	
• Great black backed gull		Highest	High	
Puffin	139	Moderate	High	Yes
Fulmar	134	Moderate	High	
Razorbill	38	Lowest	High	Yes
Shag	25	Lowest	High	Yes
Manx shearwater	18	Lowest	Medium	
Cormorant	4	Lowest	Medium	
Arctic skua	1	Lowest	High	Yes
European storm petrel	Unknown	Lowest	High	
Leach's storm petrel	Unknown	Lowest	High	
Little gull	Unknown	Lowest	Low	
Black guillemot	Unknown	Lowest	High	

There are several caveats associated with the evidence underpinning the impact assessments, most notably:

- The numbers are only from reports submitted to NatureScot from key colonies and are therefore likely to be only a small proportion of the numbers of seabirds that have likely died.
- Reporting coverage varied across Scotland, with more remote locations often having limited or no data available. Furthermore, it is more difficult to survey species that nest in burrows (such as Manx shearwater and puffin) so there is lower confidence for these species.

- There is higher confidence in the impact assessments for gannet, great skua and terns. Where confidence is lower, impacts could be significantly greater than assessed.
- There is no estimate of the numbers of seabirds dead at sea; seabirds were only counted if they washed-up on the coast, and these counts were not always undertaken in a systematic manner.