

Questions and answers from ESS online information sessions, January 2022

ESS' remit

Will ESS be taking over the ownership and management of environmental monitoring infrastructure such as air quality monitoring stations?

No. This responsibility will remain with the organisations who are currently responsible for this infrastructure. However, ESS will instead seek to access the monitoring data and information provided by this infrastructure to inform our monitoring and investigations. ESS has powers set out in its governing legislation which entitle it to have access to the information it needs to make its decisions.

Our monitoring work may also identify gaps in data collection and, where this is the case, ESS will work with the responsible organisations to ensure these gaps are addressed.

Does ESS' remit cover marine issues (e.g. emissions in ports and at sea), or does it relate to land-based issues only?

Yes, our remit will include marine issues. Where there are relevant Scottish environmental laws and standards covering marine issues, ESS' remit will include oversight of their implementation and effectiveness.

Do you see the exclusion of finance and budgets from ESS' remit as a significant constraint?

No – we don't see this as a significant issue. It is, essentially, saying that legislation which is specifically about budgets is outwith our remit. Our focus is on the effective implementation of environmental law – which may include commentary about resourcing – but it is the Scottish Government's responsibility to determine the resources required to achieve the standards set out in that law.

ESS' investigations and their conduct

Where investigations cover different governance levels (for example, for air quality there can be local responsibilities for local hotspots, and a national responsibility for strategy and overarching issues), will ESS look into the interactions between these different governance levels?

Yes – not all environmental issues will be as simple as a single body or law not operating correctly. This was anticipated in our governing legislation and ESS will be able to write cross-cutting improvement reports that cover and make recommendations about different governance levels.

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How will ESS' approach to the informal resolution of issues work with your commitment to transparency? What will ESS make public about any issue resolved informally?

Informal resolution will likely be the quickest route to getting environmental improvements in response to issues we identify. ESS will publish information on any issue where we have reached informal resolution, reporting on the issue and explaining what has been achieved.

If ESS finds that an existing environmental law or standard is being complied with but is not providing sufficient environmental protection, will ESS make recommendations as to what a sufficient revised standard or law might be?

ESS is able to make recommendations for improvements to the law in an improvement report to the Scottish Parliament. In such a scenario, the Scottish Government is required to produce an action plan for implementing the report's recommendations, and the Parliament will determine whether that action plan is acceptable.

Is the economic significance of an environmental issue a factor that is likely to influence ESS' investigations and recommendations? For example, breaches of environmental standards resulting from the sewage network may be extremely costly to rectify.

We are clear that our focus is on the environmental outcome – i.e. the impact of laws and their effectiveness on the environment. Our governing Act sets out the definition of 'the effectiveness of environmental law' and emphasises a focus on environmental outcomes. We can take into account secondary outcomes such as public health, economic impact, etc., but the Act is clear that these are secondary considerations that we should only take into account in so far as they are compatible with the environmental outcome.

ESS is likely to find itself dealing with issues and situations where there may be longstanding failures to improve standards or meet environmental targets. Is there a risk that ESS' status as an extra step in the process leads to further delay on these improvements, and might a focus on informal resolution lead to those improvements being drawn out?

ESS will shortly publish customer service standards setting out how the timescales for how we will respond to representations made to us. We hope that our status as a Scottish body as opposed to an EU-level, EU-wide one will encourage representations to be brought and enable us to communicate improvements that are being made in Scotland.

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Our Interim Strategic Plan notes that informal resolution is our preferred initial course but that if this is not achieved within a reasonable timescale then we will move to formal action as necessary. The consultation on our final Strategic Plan will include consultation on ESS' use of its powers, and how we use them and escalate through them where resolution, or the implementation of the changes needed, are not being achieved.

To take our current investigation into air quality as an example, this is recognised as a long-standing issue; a key aspect of that investigation will be whether the actions proposed by the Scottish Government in the Cleaner Air for Scotland 2 Strategy to resolve the issue will make the difference needed and make it quickly enough.

ESS' enforcement powers and their use

ESS can apply for a judicial review if an issue is considered 'serious'. Who decides what is classed as 'serious' and what is the criteria?

In this context, the Continuity Act sets 'serious' as the trigger for when ESS can apply for a judicial review on the grounds of a serious breach of compliance, or of a serious impact or likely impact on the environment – but it does not go on to define 'serious'. We will therefore consult on this specific point – how we define 'serious' in this context and what factors we take into consideration – as part of the upcoming consultation on our Strategic Plan.

Will judicial reviews be brought directly by ESS where necessary?

We will have the power to bring judicial reviews ourselves if the criteria for seriousness are met; we may also apply to join judicial reviews brought by other organisations if we feel it necessary and appropriate to do so.

Is there a potential conflict of interest in being funded by the Scottish Government and potentially pursuing judicial reviews against the same Government?

Scottish Ministers are expected to provide funding which is reasonably sufficient to enable us to perform our functions, and we are obliged by law to publicly report on whether this funding is sufficient;. In relation specifically to judicial reviews, Ministers would be accountable to Parliament if they were not prepared to support ESS bringing judicial reviews.

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If informal resolution is not possible, what tools are available to ESS to ensure compliance? Do ESS' powers have 'teeth', such as fines or other enforcement options?

We can issue information notices to bodies to require them to provide relevant information to our investigations and there are provisions covering what happens if they do not provide the information requested. In addition, if a body does not implement the actions in a compliance notice then ESS can apply to a Court to seek enforcement and the body may be found in contempt. With regard to the recommendations in improvement reports – the Scottish Government's proposed response must be approved by the Scottish Parliament.

We would also hope that reputational impact and Parliamentary and public scrutiny will be motivators to bodies to comply with our recommendations.

We will consider including details of these powers and their operation in our Strategy, or elsewhere in our public information.

Partnership working

How will ESS collaborate with other UK Government agencies regarding cross-border issues? For example, enforcement activity for ships calling at Scottish ports is undertaken by the Maritime and Coastguard Agency, which works across the UK.

We are already working closely with our English and Welsh counterpart bodies, which have similar oversight powers in their jurisdictions, and will be aiming to agree a Memorandum of Understanding to cover joint working on cross-border and common issues.

We will aim to work in partnership with wider agencies where they can assist our monitoring and investigations with data and information.

What dialogue and links will ESS seek to develop with EU countries and agencies?

In line with the Scottish Government's stated commitment to keeping pace with environmental law and new standards in the EU, part of ESS' monitoring role will be to track those developments. On an informal level we will liaise with the EU, individual member states, non-governmental organisations, etc. On a formal level, the UK Withdrawal Agreement sets out an expectation for liaison between the EU and UK supervisory bodies on the environment; a committee is currently being established to facilitate that liaison.

ENVIRONMENTAL Standards Scotland

How will ESS feed into exercises that do not arise from the Scottish Government or Scottish public authorities that nevertheless have the potential to affect law relating to Scotland? For example, the current UK government review of retained EU law,

ESS will be interested in contributing to such exercises and will be considering how best to do so. We will be developing a horizon scanning function to identify such developments and opportunities. We will also share intelligence with our English and Welsh counterparts.

As noted above there will also be a liaison forum between the EU and the UK supervisory bodies which will help us gather information on these kinds of developments – which we will then consider on a case by case basis to determine whether a contribution from ESS would add value.

How does ESS propose to source data not produced by the Scottish Government or its subsidiary bodies in order to support its work?

Our approach is likely to vary depending on the case in question, but ESS will be interested in any data or intelligence that can support our understanding of the issue and possible options for resolution. We will be reliant on external data in large part; we will access official government sources but will also be open to supplementing with additional information where appropriate. ESS will quality assure any data we receive to assess its robustness and reliability prior to use.

Miscellaneous

How wide is the make-up of your staff and Board in terms of geography? Is ESS aiming to seek representation beyond the Central Belt?

While our main office is located in Edinburgh, we have been operating remote since our inception due to the coronavirus pandemic and we aim to continue to offer staff this flexibility in future. As we continue to recruit staff we will not include a requirement for regular attendance at our Edinburgh office and we would welcome applicants located anywhere across Scotland.

As regards our Board, its membership currently includes representation from both within and outwith Scotland, and again as we look at recruiting additional members we would welcome applications from across Scotland.