

29 April 2024

### **Environmental principles, governance and biodiversity targets: White Paper**

1. Environmental Standards Scotland (ESS) welcomes the opportunity to provide evidence to support consideration of these proposals and contribute to the development of an environmental oversight function in Wales.
2. ESS is a Non-Ministerial Office directly accountable to the Scottish Parliament. Since 1 October 2021, it has been a component of the system of environmental governance in Scotland following the UK's exit from the European Union and the end of oversight of implementation of European Union environmental law by the European Commission and the European Court of Justice. ESS' remit is to:
  - ensure public authorities, including the Scottish Government, public bodies and local authorities, comply with environmental law
  - monitor and take action to improve the effectiveness of environmental law and its implementation.
3. In this letter we aim to provide an overview of ESS' remit, functions and experience to date, with relevance to the proposals set out in the Welsh Government's White Paper on environmental principles, governance and biodiversity targets. ESS would be happy to

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provide further information to the Welsh Government on our remit, functions and experience to date to support the development of these proposals.

## **Environmental Governance and Principles in Scotland**

4. The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the Continuity Act') establishes the framework for environmental principles in Scotland following EU exit and sets out the related duties that apply to the Scottish Government and public authorities. The Continuity Act and [Scotland's Guiding Principles on the Environment: Statutory Guidance](#) set out the purpose of the duties under sections 14 and 15 of the Continuity Act and the extent to which those duties apply to decisions made by duty holders.
5. Scotland's Guiding Principles on the Environment: Statutory Guidance sets out the requirements for duty holders and provides further explanation of the principles, how they apply and indicative examples. The guidance notes that the duties should be considered early in the decision-making process and that it must be given the appropriate significance while taking into account other factors such as other legislative duties. Establishing environmental principles in Scottish legislation provides continuity in how the environment is considered when making relevant legislation and policy, following EU exit.
6. ESS is part of the environmental governance system within Scotland. This system includes: the development and making of environmental law and policy; implementation of those through national and local governments, public authorities and regulators; scrutiny and oversight of compliance with, and effectiveness of, environmental law by ESS; oversight by the Scottish Parliament; and independent judicial scrutiny and decision-making.
7. As part of ESS' role to consider compliance with, and the efficacy of, environmental law, we undertake analysis and investigations on a range of environmental topics such as aspects of air quality and climate change. ESS' work can be in response to

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representations received from members of the public and other concerned parties, or through our own identification of potential issues of concern.

8. A clear principle in the creation and establishment of ESS has been its independence from the Scottish Ministers. The Continuity Act requires ESS' strategic plans to have parliamentary approval and the appointment of ESS Board members to have parliamentary approval. In addition, on a non-statutory basis, ESS provides a six-monthly written update to the Scottish Parliament's Net Zero, Energy and Transport Committee on its work and is subject to an annual review of its work by that committee.
9. The Welsh Government's White Paper on Environmental principles, governance and biodiversity targets describes ESS as a Non-Departmental Public Body in Part B, paragraph 8. As noted above, ESS is a Non-Ministerial Office that is directly accountable to the Scottish Parliament unlike Non-Departmental Public Bodies that are accountable to the Scottish Ministers. As such, ESS does not provide advice and guidance on environmental policy to the Scottish Government. As set out in the Continuity Act, ESS may make recommendations in relation to any matter relevant to our functions.

### **Organisational development**

10. ESS laid its first complete [annual report and accounts](#) for the 18 months from 1 October 2021 to 31 March 2023 in the Scottish Parliament on 26 October 2023. Since its first day of full operation on 1 October 2021, ESS has increased its staffing from 10 people to its current complement of 23. ESS' Board has increased from five to seven members including a Chair. This reflects iterative growth of the organisation and an increase over time in the breadth and depth of work that we undertake. ESS' [first Strategic Plan](#) covers the period from 2022-25 and sets out how ESS will deliver our remit and our approach to analysis, investigations, engagement, reporting and organisational development.

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## **Representations received**

11. ESS can receive representations from members of the public, communities and organisations about concerns they have regarding environmental law and how it is implemented. Since ESS began operating on 1 October 2021, we have received a total 50 representations. In response to these representations ESS can take a range of actions including investigation, informal resolution and ongoing monitoring. The details of representations received are available on [ESS' website](#).

## **Informal Resolution**

12. In accordance with our [Strategic Plan](#), where issues exist relating to compliance with environmental law or the effectiveness of how public bodies are implementing environmental law, ESS will try and resolve matters informally with the public bodies concerned. Over the last six months, we have achieved informal resolution in a number of cases. Summary reports for completed informal resolutions are available on ESS' [website](#).

## **Improvement reports**

13. ESS can issue an improvement report if it considers that a public authority has failed to comply with environmental law, make effective environmental law or implement or apply environmental law effectively. Improvement reports are laid in Scottish Parliament by ESS, setting out ESS' recommendations to improve compliance with, or effectiveness of, environmental law. The Scottish Ministers then have six months to prepare an improvement plan and must lay it before Scottish Parliament for approval. If the Scottish Government choose to undertake a public consultation on the topic, a further three months is permitted allowing nine months in total.

## **Air Quality Improvement Report**

14. ESS laid an [Improvement Report](#) under section 26 of the Continuity Act on 29 September 2022. The Improvement Report followed an investigation into the Scottish

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Government's plans and approach to ensuring future compliance with legal limits on nitrogen dioxide levels. On 27 March 2023, the Scottish Government responded by laying an [Air Quality Improvement Plan](#) before the Scottish Parliament. This was subsequently considered by the Scottish Parliament's Net Zero, Energy and Transport Committee in [a report](#) published on 11 May 2023.

### **Climate Change Improvement Report**

15. ESS laid an [Improvement Report](#) under section 26 of the Continuity Act on 6 December 2023. The Improvement Report followed an investigation into the implementation of local authorities' climate change duties. ESS and the Scottish Government reached informal resolution on four of the five areas where ESS considered improvements were needed but failed to reach agreement in one area concerning local authorities' reporting of Scope 3 emissions. Section 30 of the Continuity Act requires the Scottish Government to lay an improvement plan responding to an improvement report within nine months, including consultation.

### **Compliance notices and judicial review**

16. ESS has yet to fully utilise the full range of enforcement powers provided by the Continuity Act. As noted above the majority of issues we have considered have resulted in informal resolution. ESS welcomes the collaborative approach to resolving issues from stakeholders and public authorities to date. We have yet to issue a compliance notice or seek to undertake or intervene in judicial review. However this aligns with ESS' expectations, thresholds and the circumstances in which the organisation would use formal powers and expect to join or apply for a judicial review.

### **Analysis**

17. As part of our Strategic Plan, we have identified a number of issues that we intend to focus our [analytical work](#) on. These are issues where we have identified potential concerns, but where further analysis is required to understand the causes and how

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policy and regulatory decisions affect these. Our analytical work may result in issues being identified for investigation, for more detailed analysis, or for ongoing monitoring.

### **Particulate matter in air**

18. On 1 February 2024, ESS published a [report](#) based on its own analytical work into particulate matter in air. This work followed the publication of revised air quality guidelines by the World Health Organisation in 2021. The report recommends that the Scottish Government reviews its standards for particulate matter as part of its forthcoming review of the Cleaner Air for Scotland strategy. It also stresses that while the focus in recent decades has been on reducing emissions from transport, attention now needs to be broadened to other sources of pollution.

### **Forthcoming legislation**

19. In addition to assessing public bodies' compliance with existing environmental law and examining the implementation or the effectiveness of environmental law, ESS monitors the development of new environmental law and will comment on it where it considers that it has a contribution to make. In particular, we are monitoring the development of the Scottish Government's Circular Economy Bill, the proposed Wellbeing and Sustainable Development Bill, Natural Environment Bill, Human Rights Bill and a proposed Member's Bill on ecocide.

### **Scottish Government's review of environmental governance**

20. Section 41 of the Continuity Act required the Scottish Government to consult on a [review of environmental governance](#). This review considered whether the Continuity Act ensures effective and appropriate environmental governance following EU exit, whether the law in Scotland on access to environmental justice is effective and sufficient, and whether an environmental court could enhance the governance arrangements introduced by the Continuity Act. The Scottish Government must lay a summary of views

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expressed in the consultation and the Scottish Ministers' recommendations in response to these views in Scottish Parliament following this consultation.

21. ESS [responded to this consultation](#) in October 2023 as a statutory consultee and welcomed the review's broadly positive views of its work to date, but acknowledged that it is too early in ESS' organisational lifetime for a fuller judgement to be made.
22. Our response noted that ESS considers that greater access to environmental justice and compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is essential and should be a key outcome in any consideration of the system of environmental governance in Scotland.
23. During the consultation, it was noted that ESS' establishment and its operation represents a change from the pre-EU exit arrangements, particularly in terms of immediacy and accessibility of ESS, and also the scope of its remit. ESS' functions and powers do not extend to the consideration of individual cases. While ESS' investigations may take into account the way individual cases have been handled, this will often be to evaluate any wider or systemic issues arising from these cases.
24. ESS' governing legislation is clear that it cannot take enforcement action in relation to a failure to comply with environmental law arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case). It is not ESS' role to act as a means of appeal for individual regulatory decisions made by public authorities.
25. ESS normally expects that the relevant public authority will have first had the opportunity to respond to any concern before ESS is contacted. This means that ESS will generally not consider a representation until the public authority has responded to the concerns. If a response has been received and concerns remain that the public authority is not

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compliant with environmental law or is not applying it effectively, a representation can be submitted to ESS.

26. The Continuity Act defines the meaning of key terms such as public authority, environmental law, harm and protection in sections 42, 43, 44 and 45 of the Act. These definitions allow ESS to cover a broad range of environmental law, including all aspects of environmental protection and harm, particularly in relation to human beings and their enjoyment of the environment.

### **Monitoring and reporting**

27. Monitoring and reporting are significant elements of the role performed by the European Commission (EC) and the European Environment Agency (EEA), both on behalf of member states and to ensure that EU environmental law is effectively implemented. The EC produces an [annual report](#) on monitoring the application of EU law. The report details infringements, complaints and enforcement activity by member state and area of law, including the environment.
28. Monitoring, and reporting on, the state of the environment is central to the [EU's system of environmental governance](#). The EEA has a significant role in monitoring, aggregating and reporting data on the state of the environment that supports the implementation and evaluation of environmental law and policy, and provides a mechanism for accountability. While some of this falls within the responsibility of ESS, elements of the EC and EEA functions have not been fully replicated in Scottish environmental governance functions post-EU exit to date.

Yours sincerely,

Mark Roberts  
Chief Executive

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