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Edward Mountain MSP
Convener
Net Zero, Energy and Transport Committee
Scottish Parliament
Edinburgh
EH99 1SP

9 December 2024

Dear Edward,

I understand that the Committee will be taking evidence from the Acting Cabinet Secretary for Net Zero and Energy on the Scottish Government's review of environmental governance on 10 December 2024.

ESS' Board met on 6 December 2024 and, as part of its agenda, considered the statement made by Scottish Ministers to the Scottish Parliament on 19 November 2024 about the review. I wanted to write to you to set out the views of the ESS Board on some aspects of the statement.

Consideration of the individual circumstances of a local area, group or community

We note that Scottish Ministers recommend that ESS:

“should give further consideration to the conditions where it would be appropriate to investigate the individual circumstances of a local area, group or community, given the restrictions on the exercise of its functions”.

Furthermore, we note that Ministers also recommend:

“that the Parliament considers this matter in their oversight of ESS' activities and in particular when reviewing a draft revised strategy in due course”.

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ESS is currently reviewing its Strategic Plan and aims to submit a revised strategy to the Parliament for consideration and approval in the autumn of 2025. As part of that review we will give full consideration to the recommendation made by Scottish Ministers. However, to be clear, ESS does not have the power to review public authorities' individual regulatory decisions.

Section 27(a) and section 32(1)(a) respectively of the UK Withdrawal from the European Union (Continuity) Scotland Act 2021 state that ESS cannot issue an improvement report or a compliance notice in respect of:

“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).”

Section 2.7 of ESS' Strategic Plan notes these restrictions and states:

“As an oversight body we have powers to scrutinise the actions of public authorities on all aspects of environmental law. However, we are not regulators and cannot, for example, consider applications for consents, permissions or provide licences. We are also not an appeals or complaints body, so cannot reconsider decision making on individual decisions or applications.”

Notwithstanding this, ESS can (and does) assess individual cases as illustrations of how environmental regulatory systems operate systemically. Chapter 5 of ESS' Strategic Plan sets out our approach to considering the representations that are submitted to us, including the factors and considerations that we will take into account when determining whether an issue is something that we should investigate and the criteria we will use to prioritise investigations.

ESS will engage further with Scottish Government officials about this recommendation and, in particular, the intention behind it “given the restrictions on the exercise of [ESS] functions,” to more fully understand what the Scottish Government thinks ESS might do.

Other aspects of the statement

In the summary of responses to the review, there are a number of misrepresentations of ESS' functions, remit or approach:

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“One response noted that the ESS Strategic Plan states that ESS will ensure that Scotland keeps pace with developments in environmental law and policy in Europe and elsewhere. However, the respondent questioned how ESS will do this and if it is the role of ESS to provide recommendations where legislation fails to align with the EU.”

This is not accurate. Section 6.2 of ESS’ Strategic Plan states that:

“In particular, we will also consider whether – as Scottish Ministers made a commitment to do during the passage of the Continuity Act through Parliament – Scotland is ‘keeping pace’ with environmental standards in the European Union.”

Furthermore, the statement says that:

“Some responses expressed concern about a requirement for stakeholders to demonstrate systemic failure to ESS in order for it to raise an investigation into a particular issue. The responses argued that NGOs and community groups often lack the resources to identify and report systemic failures, which impacts on local communities efforts to achieving action to address local concerns.”

This is not accurate. In several places in ESS’ existing Strategic Plan it is stated that we will consider whether the issue appears to be systemic or long-standing, etc, but as part of a range of considerations for prioritising issues. In no place do we say that there is a requirement for stakeholders to demonstrate systemic failure. As noted above, there are several examples of cases that we have taken action on following representations that show that this is not the case.

Finally, the statement says:

“Some participants commented that where there is an alleged violation of laws, ESS requires a considerable amount of evidence which is difficult for small organisations to obtain.”

This is not accurate. On the contrary, we do not require a high threshold of evidence to consider a topic brought to us via a representation, and there are numerous examples where we have gathered significant further evidence ourselves to enable us to assess and take a decision on an issue. However, it inevitably makes it more likely that ESS will take an issue further in a timely manner where evidence is presented at the time the representation is submitted.

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I hope that these clarifications are helpful to the Committee in its consideration of the statement by Scottish Ministers on their review of environmental governance. ESS will consider the statement on the review of environmental governance in its entirety as part of the process of developing its next strategy.

If you require any further information in relation to your consideration of the statement please contact ESS' Chief Executive, Mark Roberts. I am copying this letter to Gillian Martin MSP, Acting Cabinet Secretary for Net Zero and Energy.

Yours sincerely,

Dr Richard Dixon
Acting Chair

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