

# Net Zero, Energy and Transport Committee

## 9<sup>th</sup> Meeting, 2024 (Session 6)

Tuesday, 5 March 2024

### Evidence session - Environmental Standards Scotland

#### Introduction

1. The Net Zero, Energy and Transport Committee has agreed to take evidence from Environmental Standards Scotland (ESS) to take stock of the organisation's most recent [Annual Report](#), and to discuss issues relating to its roles and function as Scotland's new environmental watchdog following EU exit.
2. On 27 February, the Committee received ESS's most recent six-monthly update on its work programme. A copy of this letter is available in **Annexe A**.

#### Background

3. ESS was established under the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#) ('the Continuity Act') as an independent, non-ministerial office of the Scottish Government. ESS is accountable to the Scottish Parliament.
4. The organisation is tasked with fulfilling a number of environmental governance functions previously had been carried out by EU bodies. The Continuity Act confers on ESS a wide array of enforcement powers to undertake these duties to full effect. ESS has two main responsibilities:
  - To monitor the effectiveness of environmental law in Scotland; and
  - To oversee and, if necessary, investigate compliance of public authorities with their environmental obligations.
5. ESS undertakes its roles and functions in accordance with its [Strategic Plan 2022-25](#). The Committee considered the document on behalf of the Scottish Parliament as part of its statutory approval process. It took evidence from ESS on its Plan at its meeting [on 25 October 2022](#). The Committee set out its conclusions and recommendations on the Plan in a report published [on 11 November 2022](#).

## Meeting on 5 March

6. The Committee will take evidence from ESS at its meeting on 5 March. The Committee will hear from:
  - Dr Richard Dixon, Deputy Chair, Environmental Standards Scotland; and
  - Mark Roberts, Chief Executive, Environmental Standards Scotland
7. This will be a wide-ranging session, covering all issues within ESS's roles and functions that relate to the Committee's remit. The Committee will also take this opportunity to discuss information presented in ESS's Annual Report as well as its strategic priorities for the coming year. The Committee will also discuss any other topical issues relevant to ESS. Likely topics may include:
  - **Environmental governance:** the Committee has agreed to hear from ESS on the Scottish Government's [review of environmental governance arrangements](#). Prior to this, the Committee heard from a panel of witnesses on the [review on 16 January](#) and also solicited written views from a targeted list of stakeholders. [ESS's response](#) to this call for views is available in **Annexe B**. Following this evidence session, the Committee will conclude its scrutiny by hearing from the Scottish Government at a future meeting;
  - **Air quality:** including ESS's recent [report on Particulate Matter in Scotland](#) and the Committee's report on the [Scottish Government's Air Quality Improvement Plan and wider air quality issues](#);
  - **Sewage pollution:** including any representations ESS has received relating to media reports and public concern about sewage discharges, and Scottish Water's use of Combined Sewage Overflows (CSOs). The Committee wrote to ESS about this issue [on 14 November](#). [ESS responded on 11 December](#) indicating they would be publishing a report on sewage discharges in early 2024;
  - **Climate change and biodiversity:** including ESS's oversight role for public bodies such as SEPA and NatureScot with a key role in tackling the climate and nature emergencies in Scotland, and what further governance structures for biodiversity and climate policy should be established. [ESS also recently published a report](#) on the Scottish Government's Climate Change Plan and its compliance with statutory obligations. The Committee also recently received a [submission from COSLA](#) in relation to ESS's Improvement Report on systems supporting local authorities to deliver Scotland's climate change targets.

Clerks  
Net Zero, Energy and Transport Committee

## Annexe A: Letter from Jim Martin, Chair, Environmental Standards Scotland to the Net Zero, Energy and Transport Committee

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

27 February 2024

Dear Convener,

### **Environmental Standards Scotland: Six Monthly Update**

Environmental Standards Scotland (ESS) gave evidence to the Committee at its meeting on 25 October 2022 as part of the Committee's scrutiny of ESS' first Strategic Plan. At that meeting, it committed to updating the Committee on its work every six months. This letter provides a summary of ESS' work over the last six months (September 2023 – February 2024).

I have notified the Presiding Officer that I will step down as Chair of Environmental Standards Scotland on 31 March 2024. Dr Richard Dixon, ESS' Deputy Chair, will be Acting Chair from 1 April 2024 until a permanent Chair is appointed. Dr Dixon, and Mark Roberts, Chief Executive of ESS, will give evidence to the Committee at its meeting on Tuesday 5 March 2024.

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

1. Section 41 of the Withdrawal from the European Union (Continuity) (Scotland) Act 2021 required the Scottish Government to consult on a review of environmental governance.
2. ESS [wrote](#) to the Committee on 11 October 2023 with its response to the Scottish Government's review of environmental governance.
3. ESS 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.
4. Overall, ESS considered that the Scottish Government's review was too narrow in scope and represented a missed opportunity to consider environmental governance more broadly. For example, it did not consider whether there is scope to enhance accountability with improved systems for the monitoring and reporting of environmental data and performance. Furthermore, 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.

**Representations received**

- 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 45 representations. Of these representations, ESS has taken substantive action on 41% of these. This action has included investigation, informal resolution and ongoing monitoring. The details of representations received are available on ESS’ website [here](#).

**Informal resolutions**

- 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. In summary, they cover the following topics:

Date	Subject	Public body
4 December 2023	<a href="#">Bathing waters</a>	Scottish Government
11 December 2023	<a href="#">Controlled Activities Regulations</a>	Scottish Environment Protection Agency
18 December 2023	<a href="#">Habitats Regulations Assessment</a>	NatureScot
31 January 2024	<a href="#">Public registers</a>	Scottish Environment Protection Agency
26 February 2024	<a href="#">Infrastructure Investment Plan</a>	Scottish Government

- On 28 February 2024, ESS will publish a report following a representation on the Scottish Government’s Climate Change Plan. The representation asked ESS to consider recommendations from four committees of the Scottish

Parliament<sup>1</sup>, the Climate Change Committee and Audit Scotland about the Scottish Government's previous Climate Change Plan and its plans to meet annual emissions reductions targets. ESS' conclusion is that the previous Climate Change Plan did not fully meet statutory requirements.

8. In some cases, ESS has committed to monitor public bodies' progress in implementing agreed plans. For example, ESS has been monitoring the Scottish Environment Protection Agency's (SEPA) progress in implementing its programme to remove all physical barriers in rivers by the end of 2027 on an annual basis (the next scheduled review will be in April 2024). ESS also has agreed a programme with SEPA to re-establish and develop the public registers required by legislation. ESS will monitor and report on SEPA's progress in delivering both these programmes.

### Investigations

9. ESS has been considering beginning a number of investigations based on its own analytical and monitoring work and on representations received. It will announce the launch of one of these on Monday 4 March 2024.

### Climate Change Improvement Report

10. As the Committee will be aware, ESS laid an [Improvement Report](#) under section 26 of the Withdrawal from the European Union (Continuity) (Scotland) Act 2021 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 Withdrawal from the European Union (Continuity) (Scotland) Act 2021 requires the Scottish Government to lay an improvement plan responding to an improvement report within six months.

### Particulate matter in air

11. 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

12. In addition to assessing public bodies' compliance with existing environmental law and examining the implementation of the effectiveness of environmental

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<sup>1</sup> These were: the Environment, Climate Change and Land Reform; the Rural Economy and Connectivity; Economy, Energy and Fair Work; and the Local Government and Communities Committees of Session 5 of the Scottish Parliament.

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 Committee's scrutiny of the Scottish Government's Circular Economy (Scotland) Bill, the Scottish Government's proposed Wellbeing and Sustainable Development, Natural Environment and Human Rights Bills and Monica Lennon MSP's proposed Member's Bill on ecocide.

### **Community engagement**

13. ESS has begun a new community engagement programme. This enables ESS to hear directly from local groups and communities about their environmental concerns. This will in turn inform ESS' future work and should also increase public understanding of ESS' role and remit.

### **Organisational development**

14. ESS laid its first complete [annual report and accounts](#) for the 18 months from 1 October 2021 to 31 March 2023 in the 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 (22 full time equivalents). ESS is currently working to establish a shared office space with Consumer Scotland (another recently established non-ministerial office) in Thistle House, Haymarket, Edinburgh.

I hope this update is helpful to the Committee.

Yours faithfully,

Jim Martin  
Chair

## Annexe B: Submission by Environmental Standards Scotland, 11 October 2023

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

11 October 2023

Dear Mr Mountain,

1. Environmental Standards Scotland (ESS) welcomes the opportunity to contribute to the Committee's consideration of Scottish Government's *Guiding Principles on the Environment* and to provide our views on environmental governance. In this letter, we focus on the questions that the Committee's letter posed to ESS on the guiding principles. I have also attached a copy of our response to the Scottish Government's *Review of the Effectiveness of Environmental Governance* consultation.
2. As noted in our response to the Scottish Government's consultation, 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. As part of our role to consider compliance with and the efficacy of environmental law, we are currently undertaking analysis on a number of relevant topics such as aspects of air quality and water quality. As the Committee will be aware we have previously published an Air Quality Investigation Improvement Report and also have a number of active [relevant investigations and representations that are detailed on our website](#).

### **Guiding Principles on the Environment**

Are you satisfied that the guidance will help the Scottish Government and other public bodies make sound decisions in relation to any matter under consideration that has environmental consequences?

3. 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 Scottish Government and public authorities. The Continuity Act and the *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.
4. The *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 whilst taking into account other factors such as other legislative duties.

5. The guidance sets out the expectations of duty holders, where the duties apply and their limitations. In principle, ESS is satisfied that the guidance should enable the Scottish Government and public bodies to effectively consider the environment in relevant decision-making processes. However, for guidance to be effective it is important that it remains up to date and any clarifications, amendments or corrections required are promptly incorporated into updated guidance at the earliest opportunity. It will also be important to see how the duties are implemented in practice and how good practice and compliance is demonstrated and recorded, as noted elsewhere in this letter.

Looking at the wording of the guidance, can you envisage scenarios in which it could make a difference; for instance, where it would lead the Scottish Government or a public body to adopt a changed approach on a particular matter?

6. Establishing environmental principles in Scottish legislation provides continuity in how the environment is considered when making relevant legislation and policy, following EU exit. The duties in the Continuity Act and the guidance set out in the *Guiding Principles on the Environment: Statutory Guidance* sets the expectation that these principles are considered more broadly than was the case prior to EU exit. Specifically, duty holders must have due regard to the guiding principles when developing plans and programmes that are subject to Strategic Environmental Assessment (SEA). For example, local authorities when considering Local Development Plans. This requirement seeks to operationalise the environmental principles in decision-making on relevant plans and programmes, as well as consider them at a policy level.

Will the guidance ensure the Scottish Government and public bodies are required to adhere to the environmental principles to the same extent that governments and public bodies in the EU are required to adhere to the EU's environmental principles?

7. The duties in the Continuity Act and the guidance set out in the *Guiding Principles on the Environment: Statutory Guidance* sets the expectation that these principles are considered more broadly than was the case prior to EU exit.
8. Strategic Environmental Assessment (SEA) in Scotland is implemented via the Environmental Assessment (Scotland) Act 2005. This makes provision for the assessment of the environmental effects of plans, programmes and strategies, including as set out in Directive 2001/42/EC of the European Parliament and of the Council. The Scottish Act applies SEAs more widely than the minimum required by the Directive.
9. Section 15 of the Continuity Act also established duties for public authorities to have due regard to the guiding principles when acting as a responsible authority under section 1 of the Environmental Assessment (Scotland) Act 2005. This requirement seeks to operationalise the environmental principles in decision-



making on relevant plans and programmes, as well as consider them at a policy level.

There is also now a UK policy statement on environmental principles. It applies to the development of policy by UK Ministers including when developing policy relating to Scotland in reserved areas. It does not apply to Scotland where the policy does not relate to reserved areas. Do you have a view on whether there is complementarity between the Scottish guidance and the UK policy statement. If not, could this lead to any difficulties on the ground, for instance in relation to cross-border bodies?

10. The UK environmental principles policy statement applies the principles at a higher level and explicitly notes the position set out in the UK Environment Act 2021 that *“ministers are not required to take action or refrain from taking action where there would be ‘no significant environmental benefit, or the action would be disproportionate to the environmental benefit’”*. It is positive that the environmental principles apply to policy development in the UK and Scotland as this should provide some continuity of approach, since the principles are derived from the EU environmental principles. However, there remains scope for divergence both in interpretation of the principles and how they are applied. As the requirement for these principles to be applied by public authorities through Strategic Environmental Assessment (SEA) only applies to Scotland, it is most likely that any further divergence in approach would occur at a policy level. The *Guiding Principles on the Environment: Statutory Guidance* states that *“there can be expected to be relatively few occasions on which the duty in the Continuity Act and this guidance is relevant to decisions by UK Ministers”*.

Will the guidance help the Parliament, or members of the public, hold the Scottish Government and public bodies to account on their decision-making?

11. The requirement to demonstrate and record compliance with the duties is an important principle of transparency and accountability. The guidance clearly sets out expectations of duty holders, with the Strategic Environmental Assessment (SEA) process identified as the means by which public authorities will record compliance with the duties set out in section 15 of the Continuity Act.
12. As noted, the duties set out in section 14 of the Act apply more broadly than SEA for the Scottish Government. It is helpful to see that, paragraph 6.8 of the *Guiding Principles on the Environment: Statutory Guidance* states the Scottish Government’s commitment to update the SEA pre-screening and screening templates. Paragraph 6.9 notes that where SEA is not required there will need to be ‘an appropriate and proportionate record of the consideration of the duties’ and that ‘best practice would also include making such information publicly available’. The Scottish Government should provide greater clarity on their approach to demonstrating and recording compliance with the duties in these circumstances and a clear commitment to make this information publicly available.
13. As noted in the *Guiding Principles on the Environment: Statutory Guidance*, the duties placed on Scottish Ministers and public authorities to have due regard to the guiding principles are set out in the Continuity Act and are part of

environmental law in Scotland. Individuals or organisations with concerns about how these duties are being applied can make a representation to ESS. Alternatively, ESS may itself decide to consider how the duties are being implemented and any potential non-compliance for investigation.

I hope this information is useful in the Committee's considerations.

Yours sincerely,

Mark Roberts  
Chief Executive

**October 2023**

## ESS response to the Scottish Government consultation on their Report into the Effectiveness of Environmental Governance Arrangements

### Introduction

1. ESS is a non-ministerial office directly accountable to the Scottish Parliament. Since 1 October 2021, it has been part 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.
2. The Scottish Government has produced a report on the effectiveness of environmental governance arrangements as required under the UK Withdrawal From The European Union (Continuity) (Scotland) Act 2021 ('the Act'). ESS is a statutory consultee for this consultation, and our response is included below.

### Response

#### Chapter 2. Overview of Environmental Governance

In summary, Environmental Standards Scotland's (ESS) overall views on environmental governance are:

- The review of environmental governance has taken an overly narrow scope. It concludes that the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the Continuity Act') has filled the major governance gap created by the UK's exit from the European Union. However, the review represents a missed opportunity to consider the system of environmental governance more broadly and assess whether there is the potential to strengthen the system further in the post-EU exit context. For example, it has not considered whether there is scope to increase accountability with enhanced systems for the monitoring and reporting of environmental data and performance.
- ESS welcomes the broadly positive response from Scottish Government and stakeholders in the report about its work to date. ESS acknowledges that it is too early in ESS' organisational lifetime for a fuller judgement to be made.
- ESS' position is that greater access to environmental justice and compliance with the Aarhus Convention<sup>1</sup> is essential and should be a key outcome in any consideration of the system of environmental governance.

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<sup>1</sup> United Nations Convention on access to information, public participation in decision making and access to justice in environmental matters

- ESS is not set up to fill all the environmental governance gaps left following the UK's exit from the European Union. When the UK was a member state of the EU, the Court of Justice of the European Union (CJEU) could take a more holistic view of an issue considering complex evidence and reviewing the legality of a complaint. As Scotland is no longer subject to oversight by the CJEU, this leaves a gap in governance. The Aarhus Convention Compliance Committee (ACCC) is currently considering the absence of merits-based review in judicial review.
- In principle, a court, tribunal or other judicial measures, whether new or a development of existing structures, would help support better access to environmental justice for Scotland and compliance with the Aarhus Convention, provided it was well constituted and issues such as standing, cost and merit-based review were also considered.

**1. Do you have any general comments on the scope of the review and the Scottish Government approach?**

The review of environmental governance review has taken a narrow scope, strictly tracking the requirements of section 41 of the Continuity Act. The Scottish Government concludes that provisions of the Act have filled the major governance gap created by the UK's exit from the EU. However, it has not taken the opportunity to consider the system of environmental governance more broadly and assess whether there is the potential to strengthen the system further in the post-EU exit context.

During the passage of the Continuity Act, debate in the Parliament resulted in inclusion of a duty to consult on the effectiveness of governance arrangements due to the 'gaps in governance that are likely to occur when the transition period ends.' In particular, it was argued at stage 2, that an amendment to the Bill would require the Scottish Ministers to bring forward and consult on proposals to address fully all the gaps in governance that were left by the inability to access the CJEU<sup>2</sup>. At Stage 3, Roseanna Cunningham, the then Cabinet Secretary for Environment, Climate Change and Land Reform welcomed an amendment and its 'aim of ensuring robust and meaningful scrutiny of our arrangements in relation to environmental governance and access to environmental justice— particularly as we seek to keep pace with developments in Europe'.<sup>3</sup>

**2. Do you have any further comments on wider issues of environmental governance?**

ESS is part of the environmental governance system in Scotland. This system incorporates:

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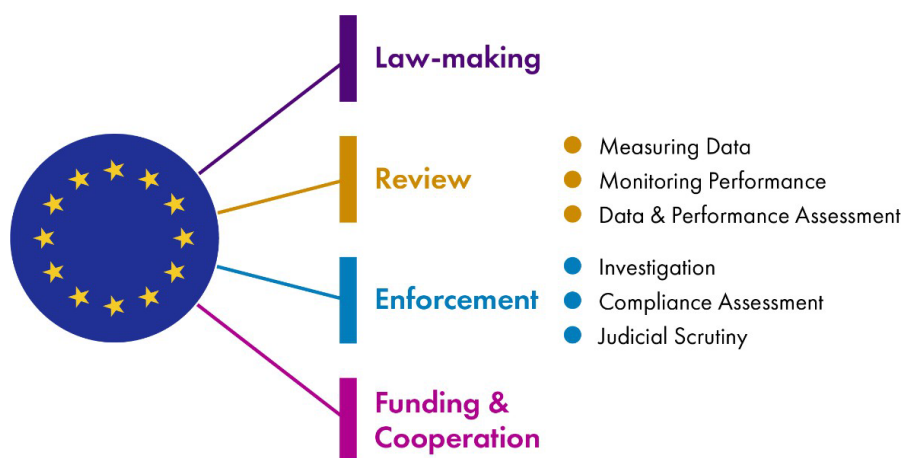
<sup>2</sup> Official Report, Environment, Climate Change and Land Reform Committee, Scottish Parliament, 24 November 2020, Session 5. UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 2 <UNSPECIFIED> ([parliament.scot](http://parliament.scot))

<sup>3</sup> [Official Report. Meeting of the Parliament, 22 December 2020 UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill: Stage 3. \(parliament.scot\)](http://parliament.scot) page 127,128

- the development of environmental policy and law by the Scottish Government;
- the implementation of environmental policy and law by the Scottish Government, local authorities and public bodies such as SEPA and NatureScot;
- scrutiny and oversight of compliance with, and effectiveness of, environmental law, by ESS (which is accountable to the Scottish Parliament);
- overarching oversight by the Scottish Parliament; and
- independent judicial scrutiny and decision-making.

Prior to EU exit, environmental governance in the UK and Scotland also relied on governance functions at a European level - these are illustrated in Figure 1. Whilst parts of the European Commission (EC) structure have been replicated and adapted for the domestic level, which includes ESS, there are areas where functions have not yet been replicated or replaced. In the absence of these, without consideration of the broader picture and an assessment of where remaining or new governance gaps exist, it is unclear how effective environmental governance is (and will be).

**Figure 1. European Union Governance Functions<sup>4</sup>**



## Law making

As a devolved nation, Scotland can develop and make laws through the Scottish Parliament. Much of Scotland's domestic environmental law, estimated around 80%<sup>5</sup>, has ultimately derived from EU environmental law and policy. Whilst Scotland

<sup>4</sup> SPICe Briefing, Environmental governance in Scotland after EU Exit, Dr Annalisa Savaresi. 9 January 2020

<sup>5</sup>[https://archive2021.parliament.scot/S4\\_EuropeanandExternalRelationsCommittee/General%20Documents/SB\\_15-71\\_The\\_impact\\_of\\_EU\\_membership\\_in\\_Scotland.pdf](https://archive2021.parliament.scot/S4_EuropeanandExternalRelationsCommittee/General%20Documents/SB_15-71_The_impact_of_EU_membership_in_Scotland.pdf), p.5

is no longer required to comply with EU rules, Scottish Ministers have indicated that, "where appropriate", they would like to see Scots law continue to align with EU law<sup>6</sup>.

Following EU exit, the Continuity Act put in place provisions to help manage this gap by giving Scottish Ministers powers to make provisions corresponding to EU law, where appropriate, in line with amendments or new legislation created by the EU, for a limited time. There is also a requirement to report to the Parliament on the use of this power annually, including how Scottish Ministers intend to use it in the future. Reports show limited use of this provision to date. Further information on the scope and transparency of Scottish Government decision-making related to the use of the 'keeping pace power' and to what extent Scottish Government routinely monitors EU legislative developments that may fall within the scope of the Continuity Act, has been sought by Parliament<sup>7</sup>.

Additional reporting has been proposed by Ministers and is expected in October 2023 to expand on how the commitment is being applied.<sup>8</sup> The Scottish Government has noted that the UK Internal Market Act (2020) and its implications for devolved competence is a significant constraint to their ambition to keep pace with the EU.

## Review

Monitoring and reporting are significant elements of the role performed by the 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<sup>9</sup>. The report details infringements, complaints and enforcement activity by member state and area of law, including the environment.

Monitoring, and reporting on, the state of the environment is central to the EU's system of environmental governance<sup>10</sup>. 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.

Whilst 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. Currently, it is unclear where monitoring as a replacement for that undertaken by the EC and EEA is delivered and its provision is fragmented. It is essential that there is a clear and effective system of monitoring and reporting to ensure that:

- environmental law and policy is fully and effectively implemented;

<sup>6</sup> [Alignment with EU law and the Continuity Act | Scottish Parliament](#)

<sup>7</sup> [continuity-act-draft-annual-report--letter-from-the-convenor-of-the-constitution-europe-external-aff.pdf \(parliament.scot\)](#)

<sup>8</sup> [EU Alignment - Continuity Act - Explanatory Note on Representations on 22 Report - LAID - 28 Jun 2023 \(parliament.scot\)](#)

<sup>9</sup> [Annual reports on monitoring the application of EU law \(europa.eu\)](#)

<sup>10</sup> Environment policy: general principles and basic framework | Fact Sheets on the European Union | European Parliament (europa.eu).

- there is means of reporting to assess (and provide) data on the application and efficacy of law and policy; and
- the public are kept informed on environmental performance.

Some pieces of ESS' work to date have identified and are considering potential gaps in how environmental performance is monitored and reported. For instance, in the delivery of the Climate Change (Scotland) Act 2009 public sector duty to contribute to meeting climate targets<sup>11</sup>. ESS is also currently undertaking work on a range of topics including air quality, climate change and sewage in the aquatic environment and will report publicly on these issues in due course.

## **Enforcement**

The EU has supranational oversight for compliance with environmental legislation by member states. The EU seeks to resolve issues informally (where possible) but can apply infraction as a tool to enforce legislative requirements where needed.

At the EU level, the CJEU has frequently engaged in complex evidential issues, reviewing the legality of acts, decisions or omissions and explicitly considering the EU environmental principles in deliberation. Concerns have been referred to the ACCC in 2017 that judicial review in the Court of Session does not allow for challenge to the substantive legality of decisions, acts, or omissions subject to the provisions of the Convention (i.e. the Court of Session allows for procedural legality review, but not merit-based review, contrary to the requirements of the Convention that both types of review be made available for eligible challenges).

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<sup>11</sup> [ESS - Investigations-Climate-change-website-information-June22 \(environmentalstandards.scot\)](https://www.environmentalstandards.scot.nhs.uk/ESS-Investigations-Climate-change-website-information-June22)

### Chapter 3. Environmental Governance Post-Brexit

- 1. Do you have any comments on the content of chapter three and the Scottish Government policy on this subject?**
- 2. Do you have any further comments on the existing environmental governance arrangements?**

ESS welcomes the broadly positive response from Scottish Government and stakeholders in the report about its work to date and acknowledges that it is early in ESS' organisational lifetime for a fuller judgement to be made. The timing of the review, although required by the Act, is very early in the post-EU exit arrangements and this limits the evidence on which to be able to make detailed comment on efficacy and appropriateness. This is also reflective of:

- The need for ESS and public bodies to adjust to new process and procedures introduced by the Act.
- ESS having yet to fully utilise the range of enforcement powers provided by the Act, for example issuing a compliance notice or seeking 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. ESS welcomes the collaborative approach from stakeholders and public authorities to date, including through the process of informal resolution.
- The complexity of the environmental governance system. As part of that system ESS recognises the importance of effective communication and engagement about who we are, our role and how to raise concerns with us. This is set out within the strategic outcomes, and wider content of our [Strategic Plan](#). We look forward to continuing to work closely with stakeholders and communities to deepen that understanding and broaden our reach.

ESS recognises that its 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. Whilst 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. 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.

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

**3. Do you have any further information or evidence on the issues presented in chapter three?**

More information on our progress can be seen in our [interim annual report](#) published in October 2022, we will also shortly (before the end of October 2023) be publishing our first full annual report and accounts covering the period October 2021 – March 2023. This is our key means of accountability to Scottish Parliament. It sets out an overview of our work and demonstrates our progress in support of our vision that Scotland's people and nature benefit from a high-quality environment and are protected from harm through the consistent application of effective environmental laws, which are recognised internationally as setting high standards.

## Chapter 4 – Access to justice on Environmental Matters

- 1. Do you have any comments on the content of chapter four and the Scottish Government position on this subject?**
- 2. Do you have any further comments on existing access to justice on environmental matters?**
- 3. Do you have any further information or evidence on the issues presented in chapter four?**

Scotland, as part of the UK, is party to the United Nations Convention on Access to Information, public participation in Decision making and Access to Justice in environmental matters (the Aarhus Convention) and has specific obligations under it. Access to justice in environmental matters is critical and can empower individuals and organisations to protect and improve the environment.

ESS welcomes the Scottish Government's commitment to 'ensuring compliance with the terms of the Aarhus Convention'<sup>12</sup> and acknowledgement that improvement is needed. However, there is a long running history and range of known issues with Scotland's compliance with the Aarhus Convention which dates from 1998;

- Scotland has been found to be in breach of the Aarhus Convention in ten consecutive findings since 2014 by the UNECE ACCC.
- A long-standing issue identified by the ACCC has been that the Scottish legal system remains prohibitively expensive with regards to access to justice in environmental matters. Decision VII/8s of the ACCC requires the UK to submit an Action Plan to set out their strategy to implement the ACCC's recommendations, with a deadline of 1 October 2024. With input from Scottish Government, the UK Government submitted an Action Plan on 1 July 2022.
- Access to justice, the third pillar of the Convention, includes a right for parties with sufficient interest in a proposed project or activity covered by the Convention to seek a review of the decision-making process which considers the substantive legality of the decision, the procedural legality of the decision or both<sup>13</sup>. The report on the review of environmental governance notes that there are calls for merits- based review to be included within the Scottish judicial system. Scottish Government's view is that this could add delay, complexity and uncertainty, but it notes that this will be further considered in the development of the Human Rights Bill. When the UK was a member state of the EU, the Court of Justice of the European Union (CJEU) could take a more holistic view of an issue considering complex evidence and

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<sup>12</sup> [Report into the Effectiveness of Governance Arrangements, as required by section 41 of the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021 \(www.gov.scot\)](#) Page 15.

<sup>13</sup> [Aarhus Implementation Guide interactive eng.pdf \(unece.org\)](#)

reviewing the legality of a complaint. As Scotland is no longer subject to oversight by the CJEU, this leaves a gap in governance.

- It is disappointing that the review does not consider concerns that have also been referred to the ACCC in 2017, regarding access to justice, in particular that judicial review in the Court of Session does not allow for challenge to the substantive legality of decisions, acts, or omissions subject to the provisions of the Convention (i.e. the Court of Session allows for procedural legality review, but not merit-based review, contrary to the Convention requirements that both types of review be made available for eligible challenges). This is a live issue awaiting a decision by the ACCC.
- The Scottish Government has set out in its review a range of mechanisms which are in development and work is underway to help realise their commitment to ensuring that there is effective access to justice on environmental matters in Scotland. Whilst these measures should support better access to justice, it is unclear when these will come into effect, whether they will be sufficient and how their effectiveness will be monitored and evaluated.
- On the specific proposals, ESS welcomes the proposed human right to a healthy environment and associated duties on public bodies, which may be another route to increase access to justice. However, without the full detail, especially around how the right will be defined and enforced, it is too early to judge what the practical implications of the new right will be. Also, in an already complex environmental governance landscape, it will be important that public bodies are clear on their responsibilities, and individuals on how to exercise the right, for it to be effective.

It is positive that the range of tools available through judicial remedies could be reviewed as part of the Human Rights Bill proposals and it is important that the inter-related issues of cost, merit and standing are also considered in combination. The Scottish Government should strive to ensure full compliance with the Aarhus Convention by demonstrably meeting the requirements and ensuring that the Scottish legislative and judicial framework fully embeds the rights as set out in the Convention.

The review of environmental governance also makes reference to the pending Scottish Civil Justice Council (SCJC) review of Protective Expense Orders (PEOs) and plans for legal aid reform. Reforming the fee structure may support compliance with Aarhus Convention procedures. ESS has considered this as part of a pre-investigation on compliance with the Aarhus Convention. This investigation is paused, pending the environmental governance review and the SCJC's considerations. ESS looks forward to seeing the outcome of the SCJC's review on PEOs and whether this would help address the "prohibitively expensive" barrier in Scotland.

Another important element of access to environmental justice includes the existence and availability of environmental data and information. Our Baseline Evidence Reviews and initial analysis on priority analytical topics has found that the availability

of environmental data is variable, with some areas and topics having better coverage than others.

However, being able to access information is an important part of being able to monitor change and understand implications for the environment. This is also fundamental to being able to raise evidence-based concerns.

## Chapter 5 – Governance Arrangements and Environmental Court

- 1. Do you have any comments on whether an environmental court would enhance environmental governance arrangements and the Scottish Government position on this subject?**
- 2. Do you have further comments on whether an environmental court can enhance governance arrangements?**
- 3. Do you have any further evidence or information on whether an environmental court can enhance governance arrangements?**

The Scottish Government's review is clear that it 'does not see any strong argument for a change in the balance of parliamentary, administrative, and judicial roles in decision making on environmental matters, and, in particular, for the creation of a specialist court'<sup>14</sup>.

ESS' position is that greater access to environmental justice and compliance with the Aarhus Convention is essential and should be a key outcome in any consideration of the system of environmental governance.

ESS welcomes the additional information provided by Scottish Government on their reasoning, which brings in stakeholders' views and draws on the United Nations Environment Programme Environmental Courts and Tribunals – 2021: A Guide for Policy Makers. The absence of this was a weakness in the Scottish Government's review of environmental governance. However, as the UNEP report sets out, there are a range of different examples of how environmental courts/tribunals are working across the world and the number and spread of environmental courts have been increasing.<sup>15</sup> An analysis of the pros and cons of different models and how they would fit into the Scottish environmental governance systems would have been valuable.

The Scottish Government notes the 'numbers of environmental crime cases prosecuted in the courts is relatively small'<sup>16</sup> and from its 2016 consultation that 'there would be relatively few cases heard in a specialist environmental court given the diversity of environmental matters and the relatively small number of cases which end up being pursued'. The review also notes that ESS has yet to use judicial measures, which is part of the reasoning for the position that Scottish Government does not see any strong argument for the creation of a specialist court. There are already concerns about the impact of prohibitive cost on access to environmental justice. Without a fuller understanding of whether the current system discourages environmental cases to come to court and whether desired outcomes are achieved,

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<sup>14</sup> [Report into the Effectiveness of Governance Arrangements, as required by section 41 of the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021 \(www.gov.scot\)](#)

<sup>15</sup> [UNEP Environmental Courts and Tribunals – 2021: A Guide for Policy Makers](#)

<sup>16</sup> [Environmental Governance Review Briefing Paper on an Environmental Court.pdf \(consult.gov.scot\)](#) p.8

the potential barriers to access to environmental justice should be considered further as part of any decision on an environmental court or tribunal.

ESS' view is that in principle, a court, tribunal or other judicial measures, whether new or a development of existing structures, would help support better access to environmental justice for Scotland, provided it was well constituted and issues such as standing, cost and merit-based review are effectively addressed. This could help address issues of the prohibitive cost of seeking a review and provide the opportunity to have substance examined rather than just procedural issues.