

Environmental Standards Scotland Draft Strategic Plan Consultation

RESPONDENT INFORMATION FORM

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Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

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We will share your response internally with other ESS teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for us to contact you again in relation to this consultation exercise?

Yes

No

Questionnaire

Our Strategic Plan Our Approach

1. Do you have any comments on our Vision and Mission Statement, set out in chapter 3.

Our **vision** is that:

Scotland's communities 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.

Our **mission statement** is that:

- *We will ensure that Scotland's environmental laws and standards are complied with, and their effectiveness improved – to achieve Scotland's ambitions for the environment and climate change.*

We are pleased that, overall, the strategy sets the direction of travel for a strong and stable body able to scrutinise the Scottish government and its agencies, as well as organisations carrying out functions on behalf of public authorities.

We are also pleased to see positive steps being taken to work collaboratively with other bodies across the UK, which will be particularly important in relation to cross border issues) and internationally.

The terms used in the mission statement 'environment' and 'climate change' are broad and not mutually exclusive.

2. Do you have any comments on our Strategic Outcomes, set out in chapter 3?

Our **strategic outcomes** are;

- *We have taken effective action to ensure public authorities' compliance with environmental law and to improve the effectiveness of the law;*
- *We have prioritised and investigated the most important matters of concern and identified the action needed to rectify problems and improve compliance and effectiveness;*
- *We have engaged in building knowledge on environmental performance, are well informed about, developments in EU and international standards and practice,*

and have formed effective partnerships with bodies collecting, collating and scrutinising environmental data;

- *Our role is widely understood and we are regularly engaged in work to improve compliance and the effectiveness of environmental law and how it is applied.*
- *We are an effective and efficient organisation*

Monitoring and action on compliance must include legislation that might not directly be 'environmental law' but that has significant wider impacts on the environment/existing environmental law, as well as secondary legislation. These ought to include international agreements to which Scotland is a signatory such as the Bern Convention and the Edinburgh Declaration.

The statement "we have engaged in building knowledge on environmental performance" could be strengthened.

It is important that the guiding principles on the environment (precautionary principle, integration principle, prevention principle, rectification at source principle, and the polluter pays principle) are widely recognised and embedded across government and its agencies, as well as organisations carrying out functions on behalf of public authorities. As government departments and agencies need to be clear on what the environmental principles mean and their duty to comply, awareness raising and training considerations need to be factored in.

Any new policies have to have the guiding principles at the core and the expectations of officials exercising their duties under the Continuity Act 2021 are clear. Officials must set out how they have considered and where appropriate applied the principles and the weight the principles should be given in the decision making process.

3. Do you have any comments on our Values and Principles, set out in chapter 3?

Our Values

Others View us as

• *Independent*

• *Transparent*

• *Trusted*

• *Effective*

Our Staff feel

• *Respected*

• *Included*

• *Innovative*

• *Collaborative*

Our Principles

- 1. We will target our efforts and resources where we can add most value – focusing where our contribution is needed most or will make most difference*
- 2. We will seek to resolve issues through agreement wherever possible – having recourse to our formal powers where we judge it is necessary to deliver the outcome expected*
- 3. We will be evidence driven – seeking a wide range of inputs and expertise to inform our work and to support our decisions and advice*
- 4. We will be open and transparent – keeping people informed about the progress of our work and providing opportunities to input to and influence it*
- 5. We will seek opportunities to work in partnership with others – working closely with all relevant stakeholders to ensure that our collective efforts deliver benefits for environmental protection and enhancement*

We support the values listed.

Although we support principle 2, informal discussions i.e. agreements, still need to be open and transparent so that the process followed is clear as outlined in principle 4.

As well as being transparent as an organisation, ESS should hold others to account on transparency so that in any policy documents produced by the Scottish government, agencies, and organisations carrying out functions on behalf of public authorities, it is clear how the guiding environmental principles have been applied. Publicly available records of when and how the principles have been applied would enable effective scrutiny of the application of the principles.

One of the principles should be to provide a framework and avenue for people to raise concerns and have environmental rights, as defined in Aarhus Convention, upheld.

Our Proposed Approach to Delivering Our Strategic Objectives

4. Do you have any comments on our proposed approach to resolving matters informally with public authorities, set out in chapter 4?

We broadly support the approach to resolving matters informally. However, there needs to be a clear strategy of how informal investigations will be recorded and what will be publicly available in accordance with ESS's stated principle of being “open and transparent”.

We agree that ESS needs to prioritise those areas of work that have the biggest and widest reaching impacts on improving the natural environment. ESS will have a relatively small staff (24 when at full complement) and will need to prioritise those actions that create the biggest environmental improvements and public benefits. However, it is

important that the emphasis on what are seen to be the most important issues cannot be construed as meaning that lesser infringements will be ignored. Moreover, some impacts may only become evident some years after developments have taken place so identifying priorities may not be straightforward.

Part of the role of ESS will be ensuring that government agencies and public authorities have the necessary resources (funding, staff capacity, access to expertise, etc.) in order to deliver government ambitions. In reference to chapter 4.7, a reasonable timescale to rectify the situation should be as quickly as possible in the event of a serious breach of environmental law.

Where a breach of law is due to ignorance of the law by one local authority or agency, ESS should be prepared to issue and publicise guidance notes along the lines of the good practice notes issued by the Scottish Land Commission so that other authorities and agencies can learn and take action.

We suggest that the approach should parallel that taken by SEPA in their compliance assessment scheme ([Compliance assessment scheme | Scottish Environment Protection Agency \(SEPA\)](#))

5. Do you have any comments on our proposed approach to determining what constitutes a systemic failure, set out in chapter 4?

We agree with the definition outlined.

6. Do you have any comments on our proposed approach to determining whether a compliance failure could be addressed more effectively by a compliance notice than an improvement report, set out in Chapter 4?

In paragraph 4.14, this should be amended to “there is a failure by one or more public authorities to comply with the law, the resulting impact on the environment is widespread, and a systemic change is required to improve compliance and/or effectiveness; **or** action is required by the Scottish Government to improve environmental law or its application.”

Environmental Standards Scotland has recently launched an investigation into the effectiveness of the systems in place concerning local authorities' contribution to the delivery of climate change targets as required by the Climate Change (Scotland) Act 2009. This will provide a useful test case to

demonstrate the process of investigation across a broad sector - local authorities across Scotland. In the press release surrounding this investigation -

Jim Martin, Chair of Environmental Standards Scotland said: "It is crucial that public bodies meet their environmental responsibilities and that robust systems are in place to help achieve this".

We strongly support 'robust systems' and we would like to see recommendations including training and resources to support Local Authorities in delivery. CIEEM can help support training and dissemination of information to members.

7. Do you have any comments on our proposed approach to determining whether a compliance failure or environmental harm is serious, set out in chapter 4?

We disagree with the way that reversibility is used here as an option. Significant harm is significant harm, the fact that it could more easily be rectified than another type of harm should not be given the same weighting as the size, scale and significance of the harm done.

8. Do you have any comments on our proposed approach to deciding whether, and how to prioritise and carry out our investigations, set out in chapter 5?

Instances of neglect should include scrutinising the capacity and resources (including skills, expertise and budgets) of public bodies to deliver government policies.

The recent CIEEM survey of Local Planning Authority capacity in Scotland sheds light on significant gaps to deliver effective ecological work in planning and the ambitions for positive effects for biodiversity in NPF4. Twenty two per cent of respondents said they have no current ecological resource or expertise available and one third said there had been cutbacks to ecological provision within their LPA (either staffing or resources) over the past 5 years, with many others citing that cutbacks had happened prior to this. Two thirds of respondents rated lack of enforcement staff to ensure compliance as a high or very high risk to their LPA's ability to implement the forthcoming [NPF4 and Positive Effects for Biodiversity](https://cieem.net/survey-of-scottish-local-planning-authority-capacity-highlights-risk-to-delivery-of-npf4/). <https://cieem.net/survey-of-scottish-local-planning-authority-capacity-highlights-risk-to-delivery-of-npf4/>

This must also apply to the central government, to ensure planning and environment teams are properly resourced, and employing environmental principles, to ensure environmental harm is avoided in conducting their activities, for example when local planning decisions are being reviewed (which has been reported to be occurring at a significant rate¹).

Continued monitoring processes set out in paragraph 5.4 should occur if the matter has been deemed to be in the remit of ESS.

We welcome the commitment to “seek advice from specialists or technical experts in particular fields to help us understand/interpret complex or technical issues or evidence relating to decisions and actions.” This should be encouraged to ensure ESS is getting a detailed understanding of often complex issues. However, it is important that ESS has staff with general knowledge of environmental issues to act as a bridge between legal experts on the one hand and environmental specialists on the other.

It is important that the staff of ESS are able to undertake training and secondments to enable them to better decide whether and how to carry out an investigation. Placements in bodies such as the Scottish Public Services Ombudsman might be helpful in building capacity.

9. Do you have any comments on our proposals for monitoring compliance and effectiveness, and taking account of different types of information, as set out in chapter 6?

Monitoring and analysis work should include high-level strategies introduced by Government, e.g. the Scottish Biodiversity Strategy, to determine whether they are ambitious enough and set out effective and measurable actions for delivering high level goals.

10. Do you have any comments on our draft priority topics for further analysis? Do you have any suggestions for key sources of data and intelligence that we should consider, as set out in chapter 6?

We would welcome views on our proposed set of initial analytical priorities and suggestions of any key sources of data or intelligence that we should be considering. We will be undertaking further work during the consultation period to verify and quality assure our work and will discuss our baseline summaries of the evidence with key data and knowledge partners.

¹ <https://www.pressandjournal.co.uk/fp/news/highlands-islands/4106297/scottish-government-planning-appeals/>

It is critical that ESS has access to the evidence needed to carry out its functions. If it does not, it needs to make this clear to the Scottish Government and Parliament. There is evidence that less data are being collected on a variety of environmental issues, for example the number of ecological samples and inspections taken by SEPA has dropped in recent years². This may hamper ESS investigations. Data from NGOs and practitioners will be important and ESS should incorporate participatory monitoring/data gathering in their considerations. Government should also be expected to maintain a certain baseline on environmental status, and not rely solely on NGOs and volunteer recorders. This is particularly important where there are gaps in data due to (unintentional) NGO/recorder bias (e.g. some invertebrate groups, lower plants, etc.)

The categories given, particularly for climate and biodiversity, are very high level and broad so it is difficult to comment on whether they truly encapsulate the key issues. There are many factors contributing to ongoing biodiversity declines despite measures being implemented in policy and law, and these will be key areas for the ESS.

Invasive non-native species are rightly given as a priority. However, it needs to be recognised that control may not be possible, particularly in the light of climate change so the topic should be 'Response to non-native species'.

In addition to upcoming strategies and policies such as the Biodiversity Strategy and the Scottish Agricultural policy, there are many major strategies that will be policy for 10+ years that are part-way through development e.g. NPF4. An assessment of whether the environmental principles to be embedded in the final NPF4 and other policy frameworks and draft bills that are already underway should be a priority. Long-lasting policy and strategies that are in development and fundamental for what Scotland will look like should set a precedent of the high standards that are expected as outlined in the environmental principles and the underlying commitment to 'maintain or exceed' environmental standards.

Some specific issues we would like to raise that need attention are:

- How positive effects for biodiversity measures as laid out in NPF4 and outlined in the NatureScot Developing with Nature guidance are going to be measured, monitored and managed in a consistent manner in Scotland

² <https://s3.documentcloud.org/documents/6781280/SePa-F0191363-Response-Fall-in-number-of.pdf>

- How positive effects for biodiversity will go beyond mitigation and achieve a measurable net gain in biodiversity, thus ensuring we meet the ambition to end biodiversity loss
- Protection of existing sites - Sites of Special Scientific Interest (SSSIs), Local Nature Conservation Sites (LNCS). During a CIEEM workshop for LPA ecologists to discuss the emerging NPF4 and Developing with Nature Guidance, many attendees reported that LNCSs are not protected, and they have no specific powers to prevent deterioration³.
- Review of effectiveness of restoration measures - e.g. peatland restoration, tree planting etc.
- Use of ecological data in review of planning applications and review of geographic coverage of record centres in Scotland
- Nutrient pollution from agriculture and development under water within the River Basin Management Plan.
- The need for an ambitious, legally-binding set of targets to secure nature recovery⁴.
- Implementation of nature networks at Local Authority level (longer term)

11. Do you have any comments on our proposed approach to avoiding unnecessary overlap with other regulators, oversight and scrutiny bodies, as set out in chapter 7?

It will also be necessary to establish good relations with bodies that have a statutory duty to ensure compliance such as SEPA, Marine Scotland and, of course, Police Scotland.

As we mentioned in response to question 1, we are pleased to see positive steps being taken to work collaboratively with other bodies across the UK such as the OEP on reserved matters, cross border issues and internationally.

12. Do you have any comments on our proposed approach to receiving and handling representations, set out in chapter 7?

We support the proposed approach and can offer CIEEM's support.

³ <https://cieem.net/resource/a-summary-report-from-scottish-lpa-event-to-discuss-the-emerging-npf4-and-developing-with-nature-guidance/>

⁴ For more info, please see Scottish Environment Link's briefing paper <https://www.scotlink.org/publication/putting-scotland-on-a-path-to-recovery-the-case-for-nature-recovery-targets/>

As well as those who are required to have due regard to the guidance we would like to see a clear plan to raise awareness of the principles and ESS with various stakeholders and members of the public. We can assist in reaching out to the 730 CIEEM members in Scotland, so please contact us if you would like our support in disseminating information to ecologists and environmental managers in Scotland.

13. Do you have any comments on how we maintain our ambition to be a high performing organisation, as set out in chapter 8?

We welcome the continued effort to build a highly-skilled and fully resourced staff at the ESS. Strong expertise and skills in negotiating agreements that deliver for the environment will be key to becoming a high-performing organisation - this will require ongoing training and support for staff development. Capacity may be an issue depending on how many cases are brought forward so clear discussions with Scottish Government will be needed to ensure there is sufficient budget available as ESS becomes established and people become more confident in bringing cases.

Measuring Our Performance

14. Do you have any comments on our proposed approach to measuring our impact, as set out in chapter 9?

The wording of paragraph 9.5: "Assuming that public authorities take the recommendations seriously and implement policy or regulatory change where required..." suggests that public bodies have the option not to. This should be strengthened.

15. Do you have any comments on our proposed key performance indicators, as set out in Annex B?

A critical element missing from this is whether or not the environment is improving. Surely this is the ultimate aim of ESS. The KPIs include "ESS' assessment of progress on Scottish Government Environment Strategy indicators" but this is just ScotGov's indicators, and not actual improvement. At least one KPI should relate to whether or not "Scotland's communities benefit from a high quality environment" as stated in ESS's vision.

Any final comments

16. Are there any other factors that you think we should consider before exercising our functions?

It may be helpful to consider why breaches of the law occur, as the appropriate remedies are likely to differ. In the case of Local Authorities, for example, a law may be broken due to:

- Ignorance of the law, which may itself be due to insufficient knowledgeable staff,
- Lack of money or staff to fully comply with legislation,
- Political pressure from the electorate, for example in relation to jobs or controls on vehicles,
- Inappropriate interactions with developers (the most egregious cases should require urgent action by Police Scotland or a Procurator Fiscal).

17. Do you have any other comments on our draft Strategic Plan and our proposed approach to fulfilling our remit?

Will the ESS have a formal role when future legislation and policies are being considered? Regional marine planning, for example, is at an early stage and there have been difficult discussions about balancing socioeconomic and environmental concerns.

18. Do you have any comments on the interim conclusions of our impact assessments, as set out in Annex A?

19. Are there any sources of information that you can suggest we use to assess the potential impact of our Plan?