

Review of the Effectiveness of Environmental Governance

Overview

General Comments

Additional general comments can be captured against numbered responses below.

Detailed Response

Specific Comments

Additional specific comments can be captured against numbered responses below.

1	Do you have any general comments on the scope of the review and the Scottish Government approach?
<p>The scope of the Scottish Government review concentrates on new measures of environmental governance that arose from in Continuity Act. We suggest that the scope of future reviews of the effectiveness of environmental governance should extend to regulatory frameworks and institutions that are already in place.</p>	
2	Do you have any further comments on wider issues of environmental governance?
<p>It is too early to comment on the effectiveness of the recently introduced governance arrangements and the powers of ESS as it has yet to be sufficiently tested. The report focuses on new governance measures to fill gaps in environmental law in Scotland that arise from leaving the EU. The report does not comment on existing environmental regulatory institutions, regulations and procedures.</p> <p>It is not clear whether ESS's assessment of priority areas in terms of compliance and effectiveness will be informed by government policies on net zero and other areas of government environmental priority. The effectiveness of governance will rely on these areas of policy being reflected in legislation and Regulations, with clear duties on bodies who must deliver against these. ESS's purpose is to ensure that public authorities comply with environmental legislation and that environmental legislation is effective. For instance, the net zero targets are enshrined in legislation therefore, if it becomes evident that the targets cannot be met, ESS has the power to investigate and take such action as it deems appropriate within its powers. As a result, ESS should be able to support achievement of the targets, holding Ministers and public bodies to account.</p> <p>In its Strategic Plan¹, ESS states that it will ensure that Scotland keeps pace with developments in environmental law and policy, in Europe and elsewhere, and as</p>	

¹ [Environmental Standards Scotland Strategic Plan 2022-25](#)

required by the Act. Whilst we support this intention, we would like to understand how ESS will do this. For example, is it the role of ESS to make recommendations for consideration by Ministers, simply to assess compliance with law in place or to scrutinise where it considers the Scottish implementation is ineffective or falls short?

3

Do you have any comments on the content of chapter three and the Scottish Government policy on this subject?

It is our view that effective and appropriate governance will depend on the way in which Environmental Standards Scotland ESS will use its powers to achieve its objectives. It is not yet clear how this will be done.

Chapter 2 of the Continuity Act makes provision for ESS to have powers to act in accordance with regulation by Scottish Parliament and functions to monitor and investigate the extent to which other public authorities comply with environmental law. In this sense the stage is set for additional governance around public bodies. This appears in contrast to the situation under EU law, where public bodies themselves are not the subject of compliance assessments, rather it is the Member State that is assessed. What is less clear at this stage is how the powers and functions of ESS will be exercised, particularly as new science and research becomes available to support the interpretation of compliance with environmental laws and where ESS powers and functions may interfere with the activities, including legal proceedings, of other existing regulators.

In our case, Scottish Water is regulated by SEPA under a suite of environmental legislation relating to water resources and sewerage. We are of the view that where we are acting in compliance with that legislation, and the licences that SEPA has issued to us, and we are abiding by the terms of the agreements that are in place between SEPA and Scottish Water we should not be subject to any action that ESS deems necessary to ensure compliance with environmental law.

ESS options for enforcement include the ability to issue a compliance notice to a public authority. This can be appealed to the Sheriff Court. ESS has the ability to report a public authority to the Court of Session if it fails to comply with a compliance notice and does not appeal it. In contrast SEPA has the power to refer a matter concerning Scottish Water to the Procurator Fiscal when it is robustly justified by evidence. This is in addition to the powers to issue fixed and variable monetary fines. We note the intention of ESS is to resolve matters informally wherever possible, which is a sensible approach. However we are concerned at the potential for us to be the subject of enforcement action under criminal and civil proceedings by SEPA and ESS at the same time in different courts for the same activity.

We further note that under the proposed legislation ESS would have powers to require information. This could in fact be in conflict with legal proceedings under other legislation, for example, DWQR enforcement notices (legal or civil) proceedings.

4

Do you have any further comments on the existing environmental governance arrangements?

Please refer to our answer to question 3



5	Do you have any further information or evidence on the issues presented in chapter three?
No comment	
6	Do you have any comments on the content of chapter four and the Scottish Government position on this subject?
No comment	
7	Do you have any further comments on existing access to justice on environmental matters?
No comment	
8	Do you have any further information or evidence on the issues presented in chapter four?
No comment	
9	Do you have any comments on whether an environmental court would enhance environmental governance arrangements and the Scottish Government position on this subject?
No comment	
10	Do you have further comments on whether an environmental court can enhance governance arrangements?
No comment	
11	Do you have any further evidence or information on whether an environmental court can enhance governance arrangements?
No comment	

- End of Document -