

Why Scotland needs an Environment Act, and what it should include

As acknowledged by the First Minister¹, we face both a climate emergency and a nature crisis. This briefing sets out why Scottish Environment LINK² believes an adequate response to these events requires the introduction of an Environment (Scotland) Bill – and the three areas it should address.

About 80% of Scottish environmental protections arise from the EU, a positive impact that cannot be doubted. This, however, does not change the fact that, as rich and diverse as our wildlife is, it is also under increasing pressure. Today, 1 in 11 species in Scotland is at risk of extinction, and we are on track to miss 13 of the 20 Aichi 2020 targets for nature³. Any UK exit from the EU (in the absence of equivalent protections and governance processes) endangers our ability to continue protecting and enhancing our environment at a critical time for nature and climate.

Environmental NGOs are calling on Scottish Government to protect our environment now and in the future. While Brexit makes the need for new legislation essential and urgent, there is a good case to improve the coherence and implementation of our environmental law whatever happens with Brexit and/or independence. **The Scottish Government therefore needs to introduce a Scottish Environment Act that will:**

Embed much needed EU and international environmental law principles in Scots law

- There are four key principles that have guided EU policy making on the environment and are applied by courts, businesses and governments in their decision-making. They are an essential part of environmental law; should continue as the basis of Scotland's environment policy and need to be legally binding.
- The bill should also address other internationally recognised environmental principles. These could include a right to a healthy environment, sustainable development, integration and non-regression. It could amend the existing biodiversity duty to ensure CBD⁴ principles are fully applied.

Create an independent and well-resourced watchdog to enforce environmental protections

- Environmental protections are only as strong as the mechanisms that enforce them. If Scotland leaves the EU, we will lose the oversight and enforcement roles of the European Commission and Court of Justice.
- These institutions perform key functions from reviewing, monitoring and reporting on the state of the environment to investigating potential breaches of environmental law, ensuring enforcement and applying sanctions in cases of noncompliance. They have played an invaluable role in giving a voice to the public on environmental matters and holding governments to account, in turn giving the environment a voice.
- The Scottish Parliament must improve and widen its scrutiny role, and the Scottish Government need to ensure that it or its agencies replicate reporting and monitoring functions. In addition, an independent "watchdog" body must be created – both well-resourced and with adequate enforcement powers.
- Those enforcement powers must include a complaints mechanism, freely accessible to all citizens, and the power to refer serious cases of non-compliance to the Courts. This may, in due course be an environmental court but a thorough review and reform of access to justice rules must also be conducted.

Set clear targets for environmental protection alongside adequate financial resources.

- A robust response to tackling the climate and nature emergencies needs an Environment Act to set a strong foundation for investing in nature-based solutions in Scotland. It should set a vision and targets for nature's recovery, ensure that nature continues to be protected and enhanced long into the future.
- Experience shows that legally binding targets provide a clear direction for government and stakeholders such as businesses and other operators. We need to build on the Scottish Government's commitment to bring forward its first Environment Strategy and ensure that its provisions are legally binding.

¹ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-48077802> and FMQs, 9th May 2019.

² Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 35 member bodies working towards a more environmentally sustainable society.

³ Agreed by all governments under the Convention on the Conservation of Biological Diversity

⁴ Convention on the Conservation of Biological Diversity (<https://www.cbd.int/>)

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Embedding EU and international environmental principles in Scots law

EU law and policy is based, under the Lisbon Treaty, on four fundamental environmental principles. These are the precautionary principle, and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In its recent [consultation](#), the Scottish Government proposed “to address the loss of legal force for the EU environmental principles through **a new legal duty on Scottish Ministers to have regard to the four EU environmental principles in the development of policies and legislation**”. The commitment to address this issue is welcome and the proposal **can only be delivered by new primary legislation**. The underpinning of Scottish Government legislative proposals and policy development with these four principles should be a core, and essential, element of an Environment Bill.

However, it is important that the duty *ensures* the principles are applied. This means that the weak wording of ‘have regard to’ should be avoided. We note that such wording was also proposed in the UK Government’s Environment Bill, leading the House of Commons’ Environmental Audit Committee to conclude: -

*“We remain convinced that the requirement to ‘have regard to’ the policy statement on principles is so vague that every decision could result in litigation. The Bill downgrades the principles’ legal effect and does not connect to the rest of the Bill or other pieces of environmental legislation. **This aspect of the Bill is not fit for purpose.**”⁵ (emphasis added)*

LINK believes that the ‘have regard to’ wording should be replaced by “act in accordance with”⁶.

In addition to these four environmental principles – derived from EU Treaties – there are several other principles, or legal concepts, that should be considered for incorporation in legislation. These are: -

1. A right to a healthy environment

Scottish Environment LINK strongly supports legislating for a “right to a healthy environment” – as recommended by the First Minister’s Advisory Group on Human Rights Leadership⁷. We are pleased the First Minister agreed these recommendations and look forward to details of the proposed National Taskforce to deliver on this agreement⁸.

This right (and parallel access to justice rights) may therefore be legislated for in an Environment Bill or a separate Human Rights Bill.

2. ‘Principles’ in the UK Government’s draft Environment Bill

The UK Government’s draft Environment Bill includes access to justice, access to environmental information and public participation as ‘environmental principles’. Scottish Environment LINK considers these to be procedural rights, rather than principles. They are enshrined in the Aarhus Convention and allow citizens and civil society to bring to life and defend the “right to a healthy environment”. If the legislation delivering this right explicitly recognises that it is to be delivered by application of these procedural rights (for instance, by reference to the UN Framework Principles on Human Rights and the Environment⁹), we do not consider these to be ‘principles’ requiring separate legislation. If this is not the case, however, a Scottish Environment Act should refer to them in the same way as the UK Government’s draft Environment Bill.

The Scottish Government’s [consultation paper](#) also refers to the principles of sustainable development and integration. The principle of integration is the idea that: -

⁵ <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf> (para 23)

⁶ This is in agreement with the House of Commons Environment, Food and Rural Affairs Select Committee report: <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvfru/1893/189308.htm>

⁷ <https://humanrightsleadership.scot/>

⁸ <https://firstminister.gov.scot/human-rights-day/>

⁹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/42/PDF/G1801742.pdf?OpenElement>

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“Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”¹⁰.

Given their international acceptance, Scottish Environment LINK considers that there is merit in incorporating these concepts in domestic law – not least as any exit from the EU would remove that stage in the process of international law and policy being reflected in domestic law and policy. However, it is of merit in any event – and we note that there are several references to sustainable development in individual, sectoral legislation¹¹.

3. Other principles mentioned in the consultation paper, including those related to the Biodiversity Duty

The Scottish Government’s recent [consultation](#) also refers to the principles of [sustainable use and ecosystem approach](#), as well as one related to the [appropriate spatial and temporal scales](#). These three principles all derive from the UN Convention on Biological Diversity agreed in 1992. In theory, these principles should already be in use to inform the development and implementation of law and policy in Scotland. However, an environment bill may amend this duty to ensure these principles are fully applied by Scotland’s biodiversity process.

The final principle referred to the consultation paper is that of [non-regression](#) – which is receiving wide international recognition and is built into the UNFCCC’s Paris agreement¹². The 2016 IUCN World Congress, in Hawaii, urged “all governments to take steps to implement effectively and to reinforce the principle of non-regression in the areas of environmental policy and law”¹³. Other jurisdictions have already enacted such an approach (see, for example, the French legislation applying this principle¹⁴). If the Scottish Government wishes to maintain its desire to be a world leader in environmental matters and to fulfil the commitment “to maintain or exceed EU environmental standards”, it will wish to include the principle of non-regression into any forthcoming environment bill.

However, in addition to non-regression, we also note that, in the debate about the UK’s proposed exit from the EU, Scottish Ministers have also said that: -

“New legislation will be brought forward to enable devolved laws to keep pace with the EU if Brexit occurs”¹⁵.

Thus, any non-regression legislation would need to be linked to any ‘keeping pace’ provision included in any successor to the Scottish Continuity Bill.

Finally, the interpretation and implementation of all the above principles should be supported by the production of a statutory policy statement. The Environment Bill should require the production of such a statement, as well as set out procedure for its production (e.g. consultation, approval by Parliament). There should be an associated duty on Ministers/public bodies to “act in accordance with” the statement.

¹⁰ Article 11 of the Treaty on the Functioning of the EU.

¹¹ Probably the earliest such reference is the Natural Heritage (Scotland) Act 1991 (s.1A). It is, however, also to be found in the Town and Country Planning (Scotland) Act 1997 (e.g. s.3D and 3E) and Marine (Scotland) Act 2010 (e.g. s.3 and 5).

¹² Although a relatively new concept in international (and some domestic) law, the idea of non-regression has been a longstanding and established principle in Human Rights law.

¹³ https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_074_EN.pdf

¹⁴ LOI n° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages. Art. 2(4).

¹⁵ <https://news.gov.scot/news/continuity-bill-update>

Why Scotland needs an Environment Watchdog

The Scottish Government has made welcome and progressive commitments to protect our environment, but to live up to this ambition we need the support of strong institutions. The Scottish Parliament unanimously supported such measures¹⁶. [The Scottish Government's Expert Roundtable](#) made the case for a new independent statutory body. **It is now critically important for Scotland to bring forward robust proposals for an Environment Watchdog which would ensure that Scotland can continue to be an environmental world leader in the future.**

Environmental governance and leaving the EU

Effective environmental governance turns laws and protections into action: it determines who keeps governments accountable and how. EU institutions currently play a major role in this; particularly, the European Commission:

- Has systematic oversight of environmental protections;
- Provides a freely accessible complaints mechanism to civil society;
- Investigates potential breaches of environmental law;
- Acts when environmental protections are not being upheld; and
- Can refer cases to the Court of Justice which can apply penalties and sanctions.

Evidence suggests that the very existence of this oversight and the potential for enforcement action has led governments, businesses and organisations to deliver better environmental outcomes. Leaving the EU would mean losing this oversight and would create an 'environmental governance gap' in Scotland and the UK.

The Scottish Government is currently deciding how to address the governance gap and has committed to *maintain or exceed EU standards*. Environmental governance is, in itself, an environmental protection and standard. **We need new governance arrangements if we leave the EU, as our current arrangements do not meet EU governance standards.** Moreover, even if we do not leave the EU, procedures for access to justice need to be improved.

What is an 'Environment Watchdog' and what should it do?

At its simplest, this is a body that provides systematic oversight of the way the environment is protected and tells the public when things are going wrong. In practice, a Watchdog could come in various different forms, for example an Environmental Ombudsman or an Environment Commissioner. Many countries already have bodies like this, for example the Environment Commissioner in New Zealand. The crucial thing is that it is truly independent of government, so it will have to be appointed by and accountable to the Scottish Parliament.

An Environment Watchdog would:

- **Oversee and scrutinise at a high-level**, for example picking up systematic failures of the government and agencies to apply protections or fund key priorities
- **Give everyone a say in environmental matters**, providing a freely accessible complaints mechanism about potential breaches of environmental law
- **Investigate and take action** if protections are not being properly applied or upheld
- **Refer cases to the Courts**, but only as a last resort if other options have failed

Why do we need it?

It's not possible to replicate supranational EU institutions so what are we really trying to do?

Evidence tells us that the functions EU institutions perform are effective in ensuring the environment is protected. We can learn from this. By identifying the most effective governance functions that EU institutions perform we can start to define what effective governance should look like in Scotland.

Even if we leave the EU, we already have regulators, agencies and parliament in Scotland, so why should we spend time and money funding a new body?

We do already have institutions that cover environmental matters in Scotland. For example:

- The Scottish Government and its agencies apply and regulate environmental law

¹⁶ Section 26A of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill [AS PASSED] was agreed unanimously.

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- The Scottish Parliament and its Committees provide scrutiny of central government and agencies on environmental matters
- Scotland's Public Services Ombudsman (SPSO) receive public complaints about the Scottish Government, its agencies and other public authorities.

These are all vital but are **not equivalent** to functions carried out by EU institutions:

- The environmental agencies in Scotland are not independent of government. Taking on a scrutinising and investigations role would mean the government '*marking its own homework*'.
- Parliamentary scrutiny, whilst hugely valuable, is partial and lacks powers to carry out detailed investigations, to enforce decisions or refer matters to the Courts.
- Complaints mechanisms focus on maladministration – we need a body to receive substantive complaints about how we protect our environment. The SPSO does not have the technical expertise or resources to deal with complex environmental cases, nor is it empowered to address the substantive issues.

If the Scottish Government wants to honour its commitment to 'maintain or exceed' EU environmental standards, then new governance arrangements are needed. This is the view of environmental NGOs, academics including the [Royal Society of Edinburgh](#) and bodies such as the Institute of Environmental Management and Assessment (IEMA), the professional body for environmental practitioners across the world, with nearly 15,000 members.

The [Scottish Government's Expert Roundtable on Environmental Governance](#) also made the case for a new body.

They said:

- *"In Scotland there are well established systems and procedures for holding public bodies to account for their performance However, these are not as well developed nor as extensive as those that apply at EU level."*
- *"There is therefore a valid case to consider additional measures to increase the levels of scrutiny and challenge that are available after leaving the EU (should that proceed)."*
- *"A new independent statutory body such as an 'Office of environmental scrutiny and audit' could be established, reporting directly to Parliament."*

To what Court should the watchdog refer the most serious cases?

In serious cases, the European Commission may refer matters to the European Court of Justice – for adjudication and, where non-compliance is proved, remedy. This is why, in the event of Brexit, it is essential that a Scottish watchdog has similar powers. As such cases will be civil matters (challenges to the actions/inactions of central or local Government, or their agencies), this would – under the current Scottish courts system – mean a reference to the Court of Session. This may or may not be appropriate – but, if it is, it will require a new procedure to be established to enable the Court to address merits (and not treat the matters in the same way as a Judicial Review¹⁷).

The need to establish a Court to address these matters raises, again, the potential benefits of an environmental court. Although the Scottish Government decided (partly due to Brexit) not to proceed further, its [last consultation](#) led to a majority of respondents¹⁸ supporting such a change or, requesting a thorough assessment of its feasibility. The establishment of a Scottish environmental watchdog should prompt a re-opening of this debate.

There are 1,500 environmental courts and tribunals across 44 countries in the world, showing that this idea is not radical but in fact tried and tested. Environmental courts have the necessary technical expertise to deal with complex environmental cases and have been shown to lead to quicker and cheaper decisions, benefitting not only environmental groups and concerned citizens, but also business, industry and decision-makers.

In any event, as well as the above consideration, whether the court is an environment court or the existing Court of Session, the current access to justice rules need to be revised to provide full compliance with the Aarhus Convention. This could be delivered either by the environment bill or human rights bill.

¹⁷ The existing Judicial review process only deals with procedural issues, and is unable to address the merits, such as "is this good or bad for the environment?" or "was the Government's scientific advice correct?". This is one example of where the current system fails to comply with the Aarhus Convention that requires a right "to challenge the substantive and procedural legality" of decisions.

¹⁸ <https://www.gov.scot/publications/developments-environmental-justice-scotland-analysis-response/pages/4/> (see table 3)

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Setting ambitious goals for the future – and the means to reach them

Legislating to embed environmental principles and establish an environment watchdog will mitigate the impacts of any exit from the EU. However, the current twin crises for climate and nature require more ambition and a step change in action across all sectors, including Government, if we are to stop and reverse the damage to our natural environment.

The Scottish Government has committed to bringing forward an Environment Strategy – the first of its kind. This is a very welcome and important step. However, to make a real difference, the ambitions, targets and steps to be taken must be legally binding.

Experience shows that legally binding targets provide a clear direction for government and stakeholders such as businesses and other operators. For example, Scotland's 2009 Climate Change Act combines ambitious legal targets¹⁹ with the requirement for a regularly updated Climate Change Plan. Our good progress, to date, as well as the acknowledgement of the need to act further where progress has been slow, would not have been possible without this combination of ambitious legally binding targets and the robust plans to achieve them.

An Environment Strategy for Scotland

In response to the Scottish Government's consultation on [Developing an Environment Strategy for Scotland](#), the environmental NGOs stated that such a strategy must: -

- Define future goals and aspirations, including measurable targets and indicators for achieving them;
- Provide a science-based overview of the state of Scotland's environment;
- Identify priority actions and provide timeframe for delivery of set actions;
- Set out a clear governance framework for the delivery of actions, including regular review;
- Identify clear funding streams for taking forward those actions.

A legally binding strategy – setting ambitions and the means to reach them

To ensure that this strategy, its content and implementation, have genuine impact, an Environment Bill must adopt this approach. It should contain at least the following provisions: -

- An overarching duty on all public bodies to secure the maintenance, recovery and restoration of the environment, so that the environment is healthy, resilient and sustainable for the benefit of people and wildlife²⁰.
- A full set of thematic and time-bound objectives which the Scottish Ministers and other public bodies, acting collectively, must achieve to comply with the overarching duty. The objectives must be at least as strong as those included in existing legal obligations, and might include the following: -
 1. Air quality is safe for human health and the environment.
 2. Our freshwaters and seas achieve good ecological status and good environmental status respectively, able to support a wide diversity of wildlife.
 3. The extent, quality and connectivity of habitats is increased, and natural processes restored, so that ecosystems on land and at sea are resilient; and natural beauty and heritage are enhanced in our landscapes.
 4. The richness of species is maintained, and their abundance maintained at or restored to, at least, favourable conservation status on land, in freshwater and at sea, with human-caused extinctions prevented. Nature-based solutions to climate change, climate adaptation and resilience will be particularly important - contributing to both this objective as well as the emissions reduction and adaptation objectives of the Climate Change (Scotland) Act 2009, as amended.
 5. Everyone has access to high quality natural greenspace where they live, to contribute to their wellbeing, and mental and physical health.
 6. Environmental justice is delivered for all, including the poorest in society and future generations.

¹⁹ Currently being revised/improved by the provisions of the Climate Change (Emissions Reduction Targets) (Scotland) Bill.

²⁰ The Bill should cross-refer to relevant definitions of these terms, contained in existing legislation, to ensure certainty and consistency.

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7. Everyone receives an inspiring environmental education and environmental matters are properly communicated to, and understood by, the public.
 8. New invasive species, pests and diseases are not being introduced to, or becoming established in, Scotland, and those already here are, at least, under effective control with their harmful impacts addressed.
 9. The Scottish economy is operating within its fair share of global environmental limits, with our overall impact on the global environment being net positive.
 10. Chemicals are manufactured, transported, stored, used and disposed of safely to protect people’s health and the environment.
- A mechanism (e.g. secondary legislation) through which the Scottish Ministers will set, within a specified timescale, legally binding SMART targets or limit values, for each of the broad objectives. This should be done on the basis of expert advice, along with genuine participation of civil society, business and other stakeholders. The targets should be accompanied by five yearly milestones which must be achieved to comply with the overarching duty²¹.
 - A duty on Scottish Ministers to publish an Environment Strategy – based on the overarching ambition, objectives and targets set out above. This would set out the mechanisms that Scottish Ministers and relevant public bodies would employ to achieve the objectives and targets. For instance, for objective 3, the strategy should establish the concept of a [National Ecological Network](#).
 - This duty should also require that the strategy provides a science-based overview of the state of Scotland’s environment (to provide a baseline), identifies priority actions and who is responsible for taking those actions and in what timeframe, and sets out a clear plan for the funding of those actions.
 - This duty should be accompanied by associated requirements to consult stakeholders during the strategy preparation and take account of those views; to secure Parliamentary approval of the final version; to review and update the strategy every five years; and to publish reports on progress in implementation.

The above may be summarised diagrammatically as follows: -

| | | | | | | | | | |
|--|---|--|--|--|-------------------------------------|-----------|------------------|-------------------|--|
| On the face of the Environment Bill | Overarching duties | | | | | | REPORTING | MECHANISMS | |
| | 1. An overarching public sector duty that integrates environmental protection and restoration cross-government 2. A duty to achieve and act compatibly with the objectives, targets and milestones 3. A duty to set targets and milestones (according to a certain process/parameters) 4. A due diligence duty | | | | | | | | |
| | Objectives A set of binding objectives listed on the face of the bill. This is the vision of the sort of environment we want. | Objectives to cover matters including: air, nature, waste, water, | | | Soil, global footprint, oceans, etc | | | | |
| Within subsequent secondary legislation | Targets Specifying the details of what it means to achieve the objectives | eg target for ambient PM level by 20xx | eg target for emissions reductions by 20xx | eg target for exposure reduction by 20xx | [example] | [example] | [example] | | |
| | Five yearly milestones Ongoing and progressive milestones on the way to the targets | 2025 | 2025 | 2025 | 2025 | 2025 | 2025 | 2025 | Collecting, collating, publishing, reviewing (watchdog?) |
| | | 2030 | 2030 | 2030 | 2030 | 2030 | 2030 | 2030 | |
| | | 2035 | 2035 | 2035 | 2035 | 2035 | 2035 | 2035 | |
| 2040 | 2040 | 2035 | 2035 | 2040 | 2035 | 2035 | | | |

The right-hand columns would be provided for by the Environment Strategy for Scotland – with the Bill providing the statutory requirement to produce that strategy, implement the mechanisms it sets up and report progress. As well as being of value in itself, this approach of a statutory overarching environmental ambition, and thematic objectives, along with a duty to develop and publish an environmental strategy, would also help mitigate any UK exit from the EU by replacing (and building on) the objectives set out in Art. 191.1 of the TFEU. It would also provide a purpose and rationale for the implementation of the environmental principles and a ‘benchmark’ against which the new governance processes could assess and, if necessary, enforce progress.

²¹ There should be explicit cross references to ensure that any targets set are commensurate with international treaties relevant to the broad objectives identified above. These treaties should be listed in a schedule to the Bill.

Conclusion and further reading

This briefing sets out the three main areas that an Environment (Scotland) Bill should cover. It should: -

- Embed much needed EU and international environmental law principles in Scots law
- Create an independent and well-resourced watchdog to enforce environmental protections
- Set clear targets for environmental protection alongside adequate financial resources.

Such legislation is both urgent and essential should the UK leave the EU. However, **there is merit in many of the proposals whatever the outcome of developments in relation to Brexit and/or independence.** The enshrining of international principles in domestic law is of value whatever constitutional arrangements exist, and the establishment of statutory ambition, targets and a strategy to protect and restore our environment is a necessary response to the twin climate and biodiversity crises whether we are in or out the EU or the UK.

A new watchdog may not be strictly necessary should we remain in the EU, as we would remain subject to the jurisdiction of the EC and the ECJ. However, that does not mean it would be without merit – it would mean that more matters would be resolved domestically without reference to Europe, and it would establish Scotland as a “world leader” in environmental protections and rights. The latter would, of course, only be the case if we addressed the issue of an environmental court and/or full compliance with the Aarhus convention.

For more detailed information on this topic:

- Environmental governance in Scotland after Brexit report: <https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/>
- Scottish Parliament evidence on the ‘Environmental governance in Scotland after Brexit’ report: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11580&i=104971>
- Scottish Government consultation on Environmental principles and governance after Brexit: <https://www.gov.scot/publications/consultation-environmental-principles-governance-scotland-4/>
- LINK Response to Environmental Principles and Governance Consultation: www.scotlink.org/wp/files/documents/SG-EPG-consultation_LINK-response_As-submitted-1.pdf
- Greener UK Headlines for the content of a Westminster Environment Bill: https://greeneruk.org/sites/default/files/download/2018-10/Greener_UK_Headlines_for_Westminster_Environment_Bill_Oct2018.pdf
- Scottish Environment LINK campaign for an Environment Act “Fight for Scotland’s Nature”: <https://www.fightforscotlandsnature.scot/>

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