



Summary

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with 40 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

Scotland must not lose crucial environmental safeguards as the UK exits the EU. Around 80% of Scotland's environmental protections currently stem from EU legislation, which have had a positive impact on our environment. However, nature continues to be under threat, with the State of Nature Scotland 2019 report finding 1 in 9 species in Scotland is threatened with national extinction and declines in wildlife across the board. Leaving the EU without robust environmental protections and standards in place risks driving further decline at the very time we need to take bold action to tackle the nature and climate crisis while making sure nature is at the heart of a green recovery.

LINK members welcome the publication of the Withdrawal from the European Union (Continuity) (Scotland) Bill to embed key environmental principles in Scots law and put in place new environmental governance arrangements. However, the draft Bill falls short of matching Scottish Ministers' stated ambitions to "maintain or exceed EU environmental standards." **As a priority, the Bill must:**

- Include a specific duty to use keeping pace powers to deliver high environmental outcomes.
- Strengthen the watchdog: ensure its independence and extend its powers to investigate casework.
- Include a commitment to future Nature Recovery Targets.
- Strengthen the duty on Scottish Ministers to act in line with environmental principles.
- Broaden the duty on other public authorities applying the principles.
- Require that any guidance on application of the principles is informed by public consultation.
- Ensure the watchdog has secure, transparent funding.
- Make provision for continued oversight following any legal judgement.
- Clarify the definition of 'environmental law' and address the implementation of international law.
- Ensure any interim watchdog has a transparent public appointments process and confirm its powers to receive and investigate complaints.

Part 1: Alignment with EU Law

The powers in Part 1 enable Scottish Ministers to align devolved law with EU legislation following the end of the Brexit transition period. This includes the ability to maintain, and where possible exceed, the EU's environmental standards. High environmental standards are critical for addressing the nature and climate emergency, and delivering a green recovery from Covid-19, and the Scottish Government has already made welcome commitments to address these. LINK welcomes the inclusion of keeping pace powers but believes the Bill as drafted contains limitations and exemptions which will weaken their effectiveness. It could be strengthened by including:

- **A specific duty to use keeping pace powers to deliver high environmental outcomes.** The Scottish Government has on several occasions committed to "maintain or exceed" EU



environmental standards after the end of the transition period. While the draft Bill *enables* Scottish Ministers to keep pace with EU law it does not *require* them to do so. This leaves open the risk of not fully utilising these powers, whether in the short term or under a future government. A duty to keep pace with environmental standards would prevent backsliding of environmental standards in future. This should include a provision to allow for rare exceptions to be made, for example where keeping pace would produce perverse consequences, but Ministers should be required to present a statement to Parliament explaining the reasons for the non-adoption of any EU environmental measures and seek Parliament's approval.

- **A commitment to future Nature Recovery Targets.** To fully realise high environmental outcomes, we must be clear about where environmental improvements are needed and how to achieve these. To ensure progress is made, the Bill should include a requirement for Scottish Ministers to bring forward future legislation to set binding Nature Recovery Targets (including duties to prepare action plans for delivery, report on progress and provide adequate funding and other resources) in addition to placing the forthcoming Environment Strategy on a statutory footing. A suite of Nature Recovery Targets across land and sea would deliver environment improvements and ensure the new standards put in place by keeping pace powers are met.

Please note a more detailed response on the implications of the keeping pace powers and alignment with EU law is set out in LINK's response to the Finance and Constitution Committee's call for evidence on the Bill.

Part 2 Environment: Chapter 1 - Environmental principles

We welcome that the Bill will embed the four EU environmental principles directly in Scots law, going above and beyond other approaches being considered across the UK. These provisions are much more robust than measures in the UK Environment Bill, which place the principles in a policy statement to which Ministers must refer. We strongly support the overall purpose of the principles being 'to protect and improve the environment' and 'contribute to sustainable development.'

Further, it is welcome that sections 9(4) to 9(8) prevents the four EU principles from being removed or revised, unless such changes occur at the EU level. This helps to deliver the Scottish Government's commitment to continue to 'maintain or exceed' EU environmental standards. These sections also allow Ministers to include additional principles in the future - we believe this to be a sensible approach and creates an opportunity to include principles such as the environmental integration principle (requiring that environmental protection is integrated into all other policy areas and actions with a view to promoting sustainable development) into law in the future.

However, there are key areas where this section of the Bill could be improved:

- **Strengthen the duty on Ministers to act in line with environmental principles.** The Bill currently places a duty on Ministers to 'have regard to' the principles. This wording should be strengthened to ensure it is effective and is in practice equivalent to the current application of principles under the Treaty for the Functioning of the European Union. In its post-legislative review of the Natural Environment and Rural Communities Act 2006 (for England), the House of Lords considered 'have regard' wording for the Act's biodiversity duty to be weak and lacking enforceability, leading to ineffective action to reverse biodiversity declines. In its scrutiny of the then UK Environment (Governance and Principles) Bill 2019, the House of Commons Environmental Audit Committee raised concerns that 'have regard to' wording was very weak, potentially downgrading the principles' legal effect. LINK urges that duty be strengthened with the alternative wording of 'act in accordance with' to set clear expectations



for how the principles are applied. This was recommended by Westminster's EFRA Committee in its pre-legislative scrutiny of the UK Environment Bill.

- **Broaden the duty on other public authorities applying the principles.** The Bill as drafted requires public authorities to have regard to the principles only as part of the SEA process. LINK considers these processes to already be limited and do not necessarily result in the best environmental outcomes - they therefore cannot be relied upon for application of the principles. Furthermore, academics and others have long stated that the EU environmental principles have a much broader application than in the creation of policy and legislation, for example individual decision-making and interpretation of court decisions. In evidence on the UK Environment Bill, Professor Maria Lee highlighted that principles should be applied to all relevant decisions by a public authority as is the case under the EU. The Committee should seek clarity from Scottish Ministers about how the duty in the Bill as drafted will provide equivalence with current arrangements under the EU.
- **Guidance on the principles should be informed by a public consultation.** LINK supports section 13 requiring Scottish Ministers to publish guidance on the interpretation of the environmental principles and how to comply with the duties. However, we believe there needs to be a clearer and statutory requirement to develop this guidance in a participative manner, including a transparent public consultation process. Such a process will ensure it is robust and fulfils the commitment to maintain EU standards.

Part 2 Environment: Chapter 2 - Environmental governance

The creation of a new environment watchdog, Environmental Standards Scotland (ESS), in this Bill is very welcome. LINK has consistently called for the creation of such a body since the Brexit referendum result, recognising that Scotland will lose the oversight and enforcement roles of the European Commission and Court of Justice once the transition period comes to an end. There is also a high level of public support for this, with a survey in autumn 2019 revealing 81% of respondents supported the creation of an independent body to replace the current oversight role of the European Commission. Support was high across the political spectrum, and supported by a majority of Leave (81%) and Remain voters (90%).

ESS's functions will include monitoring the effectiveness of environmental law and assessing data on the state of the Scottish environment. We believe this is a helpful addition to existing governance arrangements in Scotland, which should be introduced and maintained whatever future constitutional arrangements prevail. In addition, however, as research for LINK has demonstrated, this governance change should, in due course, be accompanied by measures to address access to justice issues, such as an Environmental Court.

There are, however, several areas where the arrangements for ESS should be improved:

- **Strengthen the independence of the watchdog.** LINK has consistently argued that any new watchdog must be truly independent of government and should be appointed by and accountable to the Scottish Parliament. In Schedule 1 section 1(1) it is stated that ESS is "not subject to the direction or control of any member of the Scottish Government". Yet this is undone by section 1(2) which allows an exception to be made "in this or any other enactment." The extent of the watchdog's independence, given this exemption, is questionable. To strengthen the watchdog's independence, this sub-paragraph should be deleted. In addition, while Parliament has a limited role in approving the appointment of the Board members and first Chief Executive, this risks being little more than 'rubber stamping' unless there is greater



parliamentary involvement in the selection processes. A provision should be included for the relevant parliamentary committee to specify areas of expertise that must be represented on the Board and to nominate rapporteurs to be involved in the selection process. With the selection process already underway for the “interim” members, who will become the first members, Parliament will wish to ensure it is appropriately involved in this process.

- **Powers to investigate individual decisions.** Sections 23(a) and 28(1)(a) prevent ESS from using its powers to issue improvement reports and compliance notices “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)”. LINK considers this to be an extraordinary limitation of the watchdog’s role, placing all individual decisions outwith its remit. Instead, ESS is to focus on strategic issues rather than sift through a deluge of trivial cases. However, this fails to recognise most strategic problems are often first brought to light by a failure with individual decisions. A robust triage process for dealing with complaints could also ensure strategic issues are prioritised and vexatious or trivial cases ruled out. Furthermore, it takes away power from local communities and NGOs to protect local environments, including SSSIs, national nature reserves and MPAs. Indeed, without casework powers, ESS cannot fully ‘replace’ the functions of the European Commission and Court of Justice of the EU. Evidence clearly shows that casework arising from complaints submitted by citizens, communities and NGOs has comprised the bulk of the Commission’s enforcement work.
- **Ensure the watchdog has secure, transparent funding.** An effective watchdog needs the resources - people, expertise and funds - to do its job. The bill itself contains no provisions for the watchdog’s resources but will be subject to the Scottish Government’s annual budget process. LINK urges Scottish Ministers to commit to multi-annual, ring-fenced funding. To ensure transparency, ESS should also be required to report annually on its funding mirroring the requirements for the UK OEP.
- **Make provision for continued oversight following any legal judgement.** We welcome the ability of the watchdog to seek Judicial Review in serious cases, as well as to refer cases to the Court of Session where information notices or compliance notices are not complied with. This will act both as a deterrent to non-compliance and enforce compliance where necessary. However, to replicate current EU procedure, if legal action is pursued, there should be a mechanism whereby the watchdog continues to have oversight of the outcomes of this to ensure the public agency is compliant with the Court’s judgement.
- **Clarify the definition of ‘environmental law’.** The definition of environmental law limits ESS’s enforcement powers. The definition in this Bill which restricts “environmental law” to legislation that is “mainly concerned with” the environment is potentially too narrow and may limit the body’s effectiveness. This situation mirrors that of the UK Environment Bill where similar concerns have been raised. Parliament will wish to consider whether this definition could, or should, be broadened.
- **Address the implementation of international law.** LINK warmly welcomes the Scottish Government’s policy to “maintain or exceed EU environmental standards” and maintain alignment with EU and wider international environmental law. It is therefore welcome that ESS will have specific functions in regard to monitoring international law. However, in its enforcement functions its powers are limited to matters related to compliance with “environmental law”, being defined as related to domestic enactments. This means, for instance, that ESS will not be able to take any enforcement action against Scottish Ministers for failing to transpose international law. This should be addressed - either by widening the definition of “environmental law” or adding to its general functions and powers provisions related to the implementation of international law.



General

- **Commencement date and interim arrangements for ESS.** The Brexit transition period is expected to end on 31st December 2020. In an ideal scenario, replacement governance mechanisms would be in place and operational from 1st January 2021, however we recognise the significant challenges and time constraints on the legislative process to achieve this. Schedule 1 section 13 allows for a non-statutory ESS to be set up ahead of the commencement date. This interim arrangement is welcome to avoid a governance gap, but it is important that (as the interim Board will form the first Board of the statutory body) these appointments are carried out in a transparent process. Ministers should also indicate whether the interim body will be able to accept and investigate complaints from members of the public, even if enforcement action cannot be taken until the statutory ESS is operational.

This response is supported by the following LINK member organisations:

Buglife Scotland
Environmental Rights Centre for Scotland
Fidra
Friends of the Earth Scotland
Froglife
John Muir Trust
Keep Scotland Beautiful
Marine Conservation Society
National Trust for Scotland
North East Mountain Trust
Nourish Scotland
Ramblers Scotland
RSPB Scotland
Scottish Badgers
Scottish Campaign for National Parks
Scottish Wildlife Trust
Trees for Life
Woodland Trust Scotland
WWF Scotland

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