

**UK Withdrawal from the European Union (Continuity) (Scotland) Bill**  
**Stage 2 amendments for ECCLR**

20 November 2020



Scottish  
Environment  
LINK

**Summary**

LINK members strongly support the following priority amendments (in the order of the Groupings):

**Guiding Principles**

1053, 1001, 1001A, 1002, 1003, 1056, 1058, 1052, 1064

**Environmental policy strategy**

1016, 1016A, 1016B, 1057

**Duties in relation to guiding principles**

1065, 1006, 1007, 1005, 1066, 1008, 1017, 1009

**Meaning of “environment”**

1014

**Environmental Standards Scotland: constitution**

1034, 1035, 1036, 1060, 1037, 1010, 1011, 1021, 1039, 1061, 1041

**Environmental Standards Scotland: funding**

1067, 1068

**Environmental Standards Scotland: functions**

1040, 1015, 1020, 1012, 1013,

**Environmental Standards Scotland’s powers in relation to decisions in individual cases**

1018, 1019

**Duty to consult on further improvements**

1046

## LINK position of amendments in order of Groupings

Amendment number(s)	Lodging MSP	Section(s)	Amendment type	LINK comments and position
<b>Guiding principles</b>				
1022-1028, 1030, 1033, 1052	Mark Ruskell	9, 11, 13 and Long Title	Animal Welfare	<p><b>Support in principle.</b>            These amendments include matters of animal welfare and recognition of animal sentience as part of the environmental principles. Scottish Environment LINK does not directly work on animal welfare, but recognises that animal welfare/sentience is an issue addressed in current EU law and therefore supports in principle the direction of travel of these amendments.</p>
1053, 1055, 1056, 1058, 1064	Stewart Stevenson	9, 10 and long title	Including the Integration Principle (version 2).	<p><b>Support.</b>            As above, <b>the Integration Principle is critical to ensure non-environmental policies do not cancel out the impact of good environmental policies elsewhere.</b> It is important to include as it is a key principle included in the Treaty of the Functioning of the European Union (TFEU).</p> <p>Though LINK's slight preference is for amendments 1002 and 1003 (see above), amendment 1053 and its consequential would also ensure the Integration Principle is included on the face of the bill, albeit limited to the policy-making process. Were this option preferred, the Committee might consider agreeing amendment 1003 (see above) as a consequential in order to add the reference to the relevant Article of the TFEU.</p>

1054	Claudia Beamish	9	Broadening the precautionary principle to include matters of health	<p><b>Support in principle.</b></p> <p>This amendment seeks to remove the qualification in s.9 that the precautionary principle should only be applied ‘as it relates to the environment.’ Removing this qualification would allow not only environmental matters to be considered when applying the precautionary principle but also those related to public health. This would be an important approach for issues such as fracking and points towards recognition that citizens have a right to a healthy and safe environment.</p>
1001 1001A	Mark Ruskell Claudia Beamish	9	Principle of a high level of environmental protection	<p><b>Strongly support.</b></p> <p>Inclusion of <b>this principle is essential in order to ensure equivalence with current EU arrangements.</b> Article 191 of the TFEU reads “Union policy on the environment shall aim at a high level of protection” and requires that the other environmental principles are applied in the context of aiming for a high level of environmental protection. This amendment ensures continuity is maintained with existing EU law.</p> <p><b>Amendment 101A</b> adds that this principle should be applied with a view to promoting sustainable development. This is a welcome addition and provides clarity to the application of the principle on the face of the Bill.</p>
1002, 1003	Mark Ruskell	9	Including the Integration Principle (version 1).	<p><b>Strongly support.</b></p> <p>Inclusion of the <b>Integration Principle is critical to ensure that non-environmental policies in Scotland do not contradict the objectives of environmental policy</b>, and effectively cancel out work to improve the state of the environment elsewhere. It is important to include as it is a key principle included in the Treaty of the Functioning of the European Union (TFEU).</p> <p>LINK considers amendments 1002 and 1003 to be slightly stronger than amendment 1053 (and its consequentials), as they add a reference to the</p>

				the principle’s citation in the TFEU, thus ensuring its interpretation mirrors its current interpretation. This amendment also relates to “implementation” of “policies and activities” which we consider more inclusive of all the Ministers’ functions than purely “policy-making”.
<b>Environmental Policy Strategy</b>				
1016, 1016B 1057	Claudia Beamish	After 9, 10	Environment policy strategy and nature recovery targets	<p><b>Strongly support all.</b></p> <p><b>1016</b> requires Scottish Ministers to bring forward a statutory Environmental Policy Strategy to secure the maintenance of environmental standards as have been in place under EU membership. This is critical to ensure there is a <b>duty on Ministers to achieve the outcomes</b> of the Strategy and report and monitor progress. Such a strategy will also ensure full ‘continuity’ with the current EU environmental policy regime, including its newly refreshed biodiversity strategy - which is a fundamental aim of this Bill.</p> <p><b>1016A</b> adds a requirement for the Strategy to secure improved protection, restoration and enhancement of Scotland’s biodiversity.</p> <p><b>1057</b> is a consequential amendment to 1016, <b>requiring Scottish Ministers to act in accordance with the Environment Policy Strategy</b> and should be supported.</p> <p><b>1016B is a critical amendment</b> requiring that any targets contained in the Strategy are legally-binding. Provisions to set nature recovery targets for England are included in the UK Government’s Environment Bill. <b>There is currently no development of similar targets for nature recovery in Scotland despite warnings about the crisis nature faces with 1 in 9 species at risk of extinction from Scotland.</b> Developing a set of legally-binding targets for nature recovery in the Strategy, with regular monitoring</p>
1016A	Mark Ruskell			

				and reporting, would allow Scotland to be a world leader and drive action for nature recovery across all sectors of the Scottish economy and society.
<b>Duties in relation to guiding principles</b>				
1065, 1066	Finlay Carson	10, 11	Requiring Scottish Ministers and public authorities to 'have due regard' to the environmental principles.	<p><b>Support if amendments 1006 to 1009 are not agreed to.</b> These amendments strengthen the duty on applying the principles, however they are not as strong as the changes proposed by 1006-1009 and should be viewed as second preference.</p> <p>Strengthening the duty in this way does represent an improvement on the current wording of the draft bill. The UK Government's Environment Bill (clause 18) which introduces the same four principles in relation to the responsibilities of Secretaries of State uses the term 'have due regard to.' The Scottish legislation should, at least, match that for England.</p>
1006,1007, 1008,1009	Liam McArthur	10, 11 and Long Title	Requiring Scottish Ministers and public authorities to 'act in accordance with' environmental principles.	<p><b>Strongly support.</b> These amendments strengthen the duty on Ministers and public authorities to 'act in accordance with' the environmental principles that the Bill incorporates into Scots law. This is a stronger duty than the current 'have regard to' wording, which was found by Westminster committees to be ineffective during their scrutiny of the UK Environment Bill. The ECCLR Committee also queried the strength of the current duty in its stage 1 report. This stronger duty proposed by these amendments provides greater continuity with Europe, where (under the TFEU) EU policy must be 'based on' the four environmental principles.</p>
1004	Mark Ruskell	10	Removing exemption for defence	<p><b>Support intention.</b> This amendment removes the exemption on applying the environmental principles to matters of national defence. LINK supports the intention of this amendment. However, aware of the priority that Governments accord to defence and security issues, especially military or emergency</p>

				operations, we wonder whether a narrower exemption could be considered. This would allow defence and security operations, but ensure that, for example, routine management of MoD property be subject to the principles.
1005	Mark Ruskell	10	Removes the exemption of applying environmental principles to matters of budgets and finance.	<b>Strongly support.</b> Budgets and finance, and the decisions made as a result of budget availability, can have a considerable effect on environmental outcome, through the funding (or otherwise) of policies/projects that benefit or harm the environment. These matters should not, therefore, be exempt from the application of environmental principles. This amendment removes that exemption bringing these provisions more in line with the EU, where no such exemption applies.
1029	Roseanna Cunningham	10	Removal of power to make regulations affecting the operation of the s.10(1) and s.10(2) duties.	<b>Support.</b> This amendment removes a proposed power for Ministers to amend matters related to the s.10(1) and s.10(2) duties by regulation. Such matters (other than the guidance issued under s.13) are primary legislation and any amendments would thus need to be made by further primary legislation. This was an issue highlighted by the DPLR Committee, and it is welcome to see the proposal removed.
1059	Alex Rowley	10	Regulations affecting the operation of the s.10(1) and s.10(2) duties on the principles must be made under affirmative procedure	<b>Support</b> (although would fall if Amendment 1029 agreed) This amendment would mean that any regulations proposed under s.10(4) to amend matters related to the s.10(1) and s.10(2) duties would have to be confirmed by the affirmative procedure. This was an issue highlighted by the DPLR Committee, and it is welcome to see this suggestion. However, amendment 1029 in the name of Cabinet Secretary removes the s.10(4) power as well as the related s.10(5). If amendment 1029 is agreed, therefore, this amendment would fall. <b>Should amendment 1029 not be agreed, this amendment represents a positive alternative.</b>

1017	Angus MacDonald	11	Improvements to the Strategic Environmental Assessment process	<p><b>Strongly support.</b></p> <p>This amendment ensures that when public authorities apply the EU environmental principles during the SEA process, it is also their responsibility to set out how this has been done. This adds transparency and scrutiny to the process.</p>
<b>Meaning of “environment”</b>				
1031, 1032	Roseanna Cunningham	12	Broadening of the definition of “environment”	<p><b>Support in principle</b></p> <p>At stage 1, many stakeholders commented on possible limitations with the definition of the “environment” in s.12 and s.40 of the Bill. In particular, it was observed that it was unclear whether wild plants, animals and their habitats were included. This amendment rectifies that issue and is warmly welcomed.</p> <p><b>However, amendment 1014 in the name of Claudia Beamish MSP, to the definition in s.40 is in our view a preferable approach.</b> Rather than seeking to create a “bespoke definition” of the environment, the text of amendment 1014 reproduces the definition found in the Environmental Information (Scotland) Regulations 2004. This, in turn, is based on the relevant EU Directive and thus more clearly represents ‘continuity’ from an EU approach. <b>If amendment 1014 to s.40 is agreed, LINK believes the same approach should be adopted, at stage 3, for s.12.</b></p>
1014	Claudia Beamish	40	Definition of the environment	<p><b>Strongly support.</b></p> <p>At stage 1, many stakeholders commented on possible limitations with the definition of the “environment” in s.12 and s.40 of the Bill. In particular, it was observed that it was unclear whether wild plants, animals and their habitats were included. This amendment, in the name of Claudia Beamish MSP, rectifies that issue and is warmly welcomed.</p> <p>It is, in our view, a preferable approach to that proposed by amendments</p>

				<p>1049/1050 (see below). Rather than seeking to create a “bespoke definition” of the environment, the text of amendment 1014 reproduces the definition found in the Environmental Information (Scotland) Regulations 2004. This, in turn, is based on the relevant EU Directive and thus more clearly represents ‘continuity’ from an EU approach.</p> <p><b>If amendment 1014 to s.40 is agreed, LINK believes the same approach should be adopted, at stage 3, for s.12.</b></p>
1049, 1050, 1051	Roseanna Cunningham	40	Broadening of the definition of “environment”	<p><b>Support in principle.</b></p> <p>At stage 1, many stakeholders commented on possible limitations with the definition of the “environment” in s.12 and s.40 of the Bill. In particular, it was observed that it was unclear whether wild plants, animals and their habitats were included. This amendment rectifies that issue and is to be welcomed.</p> <p><b>However, amendment 1014 in the name of Claudia Beamish MSP, is in our view a preferable approach.</b> Rather than seeking to create a “bespoke definition” of the environment, the text of amendment 1014 reproduces the definition found in the Environmental Information (Scotland) Regulations 2004. This, in turn, is based on the relevant EU Directive and thus more clearly represents ‘continuity’ from an EU approach.</p> <p><b>If amendment 1014 to s.40 is agreed, LINK believes the same approach should be adopted, at stage 3, for s.12 (see above).</b></p>



Environmental Standards Scotland: constitution				
1034-1041	Mark Ruskell	15, Schedule 1	Parliamentary Commission	<p><b>Strongly support.</b> 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. This view has been informed by <a href="#">Professor Campbell Gemmell's research</a> for LINK which concluded that a parliamentary commission model would ensure any new environment watchdog had the independence it needed to carry out its oversight functions, while being independent of government.</p>
1060	Claudia Beamish	Schedule 1	Qualifying the exception on ESS's independence from Scottish Ministers.	<p><b>Strongly support.</b> Schedule 1, section 1(1) states that "In performing its functions, Environmental Standards Scotland is not subject to the direction or control of any member of the Scottish Government." This is immediately contradicted by section 1(2) which says this provision is "subject to any contrary provision in this or any other enactment." In LINK's view, this gives Scottish Ministers too much scope to limit ESS's independence should it feel it necessary. <b>Environmental laws are only as strong as the institutions that uphold them and watchdog can only be robust and effective if it is truly independent of government. Over 6,000 members of the public have signed a Scottish Environment LINK petition calling for the watchdog to be fully independent from government.</b></p> <p>Amendment 1060 qualifies this exception by restricting the provision to matters of accounting as is sometimes necessary for public authorities.</p>
1010, 1011	Claudia Beamish	Schedule 1	Parliamentary involvement in ESS appointments process	<p><b>Strongly support.</b> <b>Amendment 1010</b> increases Parliament's involvement in the recruitment to ESS's Board by requiring Parliament to approve the terms and conditions of the appointment, including the person specifications. Such approval would, presumably, be sought before initiating a recruitment</p>

				<p>process.</p> <p><b>Amendment 1011</b> further requires Scottish Ministers to seek nominations or recommendations for ESS Board members from the Scottish Parliament.</p> <p><b>These amendments would enhance ESS’s independence from government and help meet the concerns raised in ECCLR’s Stage 1 report that current arrangements would not “provide ESS with sufficient distance and autonomy from the Scottish Government.”</b></p>
1021	Angus MacDonald	Schedule 1	Expertise of ESS Board	<p><b>Strongly support.</b></p> <p>This amendment ensures that the Board of ESS includes members with a range of environmental expertise or experience relevant to its functions. While the current recruitment process for the non-statutory Board appears to follow this good practice, this amendment would ensure this continues to be the case for future rounds of recruitment.</p>
<b>Environmental Standards Scotland: funding</b>				
1067	Mark Ruskell	Schedule 1	Requiring Ministers to provide sufficient funding to ESS	<p><b>Strongly support.</b></p> <p>This amendment adds a requirement on Scottish Ministers to provide ESS with sufficient funding to carry out its functions. This will further increase the transparency of ESS’s funding and ensure it has the resources required to further increase its independence of ESS from government.</p> <p>This amendment is based on a provision in the UK Environment Bill, in relation to the OEP. LINK believes that the funding of both governance bodies should be as secure and transparent.</p>

1068	Mark Ruskell	Schedule 1	Requiring ESS to report annually on the sufficiency of its funding.	<p><b>Strongly support.</b></p> <p>This amendment adds a requirement that ESS' annual reports include an assessment of whether it has been provided with sufficient funds to carry out its functions. This is linked to amendment 1067 and further increases the transparency of ESS' funding arrangements and independence from government, by aiding Parliamentary scrutiny of its funding.</p> <p>This amendment is based on a provision in the UK Environment Bill, in relation to the OEP. LINK believes that the funding of both governance bodies should be as secure and transparent.</p>
<b>Environmental Standards Scotland: functions</b>				
1015	Mark Ruskell	16	Compliance with international law	<p><b>Strongly support.</b></p> <p>This amendment seeks to specifically state that ESS, as well as monitoring and having regard to the developments of international and EU law, should also make recommendations about the use of the 'keeping pace powers' under Part 1 of the bill. This ensures ESS has a role in advising on whether and how Scotland maintains alignment to changes in European environmental law.</p>
1042	Mark Ruskell	After 16	Requirement for Scottish Ministers to report on ESS's functions	<p><b>Support.</b></p> <p>This amendment adds a requirement for Scottish Ministers to lay regulations requiring a report to be made to Parliament on ESS's functions. This report should outline public authorities' compliance with environmental law, the effectiveness of the law and for recommendations for future legislation to improve the effectiveness of environmental law. This amendment further enhances Parliament's ability to scrutinise ESS and ensure its independence in practise.</p>

1020	Angus MacDonald	39	Definition of environmental law - including international law	<p><b>Strongly support.</b></p> <p>If section 39(3) is interpreted narrowly, it could prevent ESS exercising its various functions in circumstances where Scottish Ministers have failed, either at all or sufficiently, to transpose an international obligation to domestic law. This is because this section defines “environmental law”, the phrase used in all the previous sections setting out ESS’ functions and powers. At present, section 39(3) refers only to domestic law. This amendment adds relevant international law, and thus removes the potential limitation on ESS’ role.</p>
1012 1013	Claudia Beamish Mark Ruskell	39	Climate Change exclusion removed	<p><b>Strongly support.</b></p> <p>These amendments remove the exclusion of Parts 1 to 3 of the Climate Change (Scotland) Act 2009 from the definition of environmental law and brings these activities into the scope of ESS’s functions.</p> <p>If these amendments are agreed, then amendments 1062/1063 are complementary in that they ensure that ESS’s strategy outlines how it will operate so as not to duplicate <i>inter alia</i> the role of the Committee on Climate Change.</p>
1047, 1048	Roseanna Cunningham	39	Broadening the definition of the “effectiveness of environmental law”	<p><b>Support (although LINK’s preferred approach is amendment 1020)</b></p> <p>At stage 1, some concerns were raised about whether the definitions of environmental law etc restricted the ability of ESS to assess compliance with international law and/or the effectiveness of that law. We therefore welcome this amendment, in the name of the Cabinet Secretary, to address this issue.</p> <p><b>However, in our view, amendment 1020, in the name of Angus MacDonald MSP, is a more effective means of addressing the issue.</b></p> <p>Amendment 1020 alters the definition of “legislative provision” and thus of “environmental law” - this is the term repeated in all of the provisions related to ESS’ functions and powers. This amendment broadens the interpretation only of the phrase “effectiveness of environmental law” -</p>

				and, therefore, where the phrase “compliance with environmental law” is used “environmental law” would be construed in the narrower sense. This could prevent ESS, for example, advising that Scottish Ministers were failing to comply with international law (unless such a failure would also be interpreted as rendering the international law “ineffective”). To avoid challenge and debate, the approach suggested by amendment 1020 is preferable but, should that not be agreed, we would support this approach as an alternative.
<b>Environmental Standards Scotland: strategy</b>				
1062, 1063	Angus MacDonald	Schedule 2	ESS not to overlap with functions of other public bodies.	<b>Support.</b> LINK is content with the suggestion to include Audit Scotland, Scottish Information Commissioner in Schedule 2. However, we would only want to see the inclusion of the and the Committee on Climate Change if amendments 1012 and 1013 are agreed to which bring climate change under the remit of ESS.
<b>Environmental Standards Scotland’s powers in relation to decisions in individual cases</b>				
1018, 1019	Angus MacDonald	23 and 28	Individual cases	<b>Strongly support.</b> <b>Amendments 1018 and 1019 are critical for ensuring ESS provides continuity with existing arrangements under the EU and upholds the rights of people in Scotland to see action taken in response to environmental complaints they raise about decisions that have been taken by public bodies.</b>  The European Commission has played a critical role in the oversight and enforcement of environmental protections, in particular through receiving complaints on potential failures to apply or the misapplication of environmental law in individual decisions. This has included planning applications or licensing decisions. <b>[continued overleaf]</b>

				<p>This amendment would remove the exemptions set out in sections 23 and 28, which restrict ESS from using its enforcement powers in cases involving individual decisions. As drafted, the Bill places a limitation on ESS's enforcement powers - it can receive information about a complaint but it cannot take action (short of Judicial Review) to remedy the issues. The Office for Environmental Protection as proposed in the UK Environment Bill does not face this same limitation. Under current arrangements, Scottish citizens will have fewer rights to raise their concerns with ESS than English counterparts will with the OEP.</p> <p>This would <u>not</u> represent an additional layer of appeal as ESS would be unable to overturn any decision - but simply advise the original body of their error/failure (it would be for that body to determine if or how it should be 'corrected'). It would also not cause ESS to be overwhelmed with a large volume of casework as it would undoubtedly set up a triage system to prioritise strategic cases (and remove vexatious cases) through its strategy. It would, however, remove the legal barrier to allowing the occasional case on an independent complaint to be fully investigated and enforcement action taken. This is a right that has existed under EU membership, where many strategic, precedent-setting cases have begun life as a complaint about an individual decision.</p> <p>Over 6,000 members of the public have backed a Scottish Environment LINK petition calling for ESS to have the powers to take enforcement action on individual complaints.</p>
<b>Confidentiality of proceedings</b>				
1043, 1044, 1045	Roseanna Cunningham	36	Alterations to provisions relating to EES'	<p><b>Support.</b> At stage 1 some concerns were raised, including by the Committee, about the extent of the s.36 provisions related to ESS's duty of confidentiality.</p>

			duty of confidentiality.	These various amendments, including some additions and significant deletions, appear to clarify and simplify s.36 and are therefore very welcome.
<b>Duty to consult on further improvements</b>				
1046	Liz Smith	After 36	Further governance improvements, including Environmental Court	<p><b>Strongly support.</b></p> <p>Whilst the creation of ESS is welcome and necessary, it will not be sufficient on its own to fill the environmental governance gap that will arise due to EU exit. The Scottish Government’s <a href="#">Roundtable on Environment and Climate Change</a> and <a href="#">Professor Campbell Gemmell’s research</a> for LINK, found that the loss of access to the Court of Justice of the EU would create a gap relating to access to justice and the ability to conduct merits based reviews of environmental cases.</p> <p><b>The creation of ESS and the use of Judicial Review as an ultimate backstop will not be sufficient to fill these aspects of the governance gap.</b></p> <p>This amendment would require Scottish Ministers to bring forward and consult on the need for any further governance changes. These would include consideration of a dedicated Environmental Court or Tribunal in Scotland, but could also look at improvements to the status and powers of ESS.</p>

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 35 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society. This response represents the collective view of LINK’s [Governance Group](#). Members may also respond individually in order to raise more detailed issues that are important to their particular organisation.

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