



The James  
**Hutton**  
**Institute**

# Analysis of Responses: Environmental Standards Scotland: Strategic Plan Consultation

Report: September 2022

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**ENVIRONMENTAL**  
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Ìrean Àrainneachdail na h-Alba

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## EXECUTIVE SUMMARY

Environmental Standards Scotland is a new independent public body, established by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. ESS exists to monitor the effectiveness of environmental law in Scotland, and public authorities' compliance with that environmental law, as well as to prevent enforcement gaps arising from the UK leaving the European Union.

This report summarises responses received to a public consultation on ESS's draft Strategic Plan, to inform the development of the final Strategic Plan, which will be submitted to the Scottish Parliament for approval by 01 October 2022.

The consultation on the draft Strategic Plan opened on 25<sup>th</sup> May 2022 and closed on 17<sup>th</sup> August 2022 and was available through the Scottish Government's 'Citizen Space' online consultation hub and by email and post. A total of 40 responses were received to the consultation: 9 responses were submitted by individuals, and 31 responses were received from organisations. Organisational responses included responses from Government and Public Bodies (5 responses), oversight/scrutiny bodies (1 response), local authorities (4 responses), professional bodies (7 responses), non-governmental organisations (NGOs) (10 responses) and trade bodies (4 responses).

### Overall response

Respondents welcomed the establishment of ESS, and there was broad support for the aims and level of ambition set out in the Strategic Plan. A range of suggestions to enhance or strengthen the Plan and its contents were made, and respondents also sought clarification about some of the terminology used, to provide more information about how ESS will undertake its responsibilities. The suggestions and observations raised cover a wide range of themes in response to specific questions raised by ESS about the content and intent contained in the Strategic Plan. A number of broad themes were present across the responses, of which the most common are summarised below.

- Organisations and individuals welcomed the establishment of ESS and expressed willingness to support the activities of ESS through active collaboration and partnership working. Respondents reflected on the limited resources available to ESS and supported the prioritisation of issues within the capacity of the organisation and emphasised effective partnership working to manage the challenges of limited capacity.
- While respondents generally reflected positively on the inclusion of collaboration in the Strategic Plan, there were also indications of concern surrounding the duplication of efforts due to similarities between ESS and other organisations as well as the risk of public confusion regarding the remit of ESS. Relationship mapping and clear indication of remits and responsibilities across organisations were just some suggestions among many to address such concerns.
- Several respondents emphasised the need to include the biodiversity and climate crises as a critical backdrop to the work of ESS. Respondents sought further reference to

environmental improvement and protection as a priority and intended outcome of the organisation's work.

- Respondents highlighted questions regarding how ESS might work to ensure compliance with environmental law as well as to identify areas where environmental law may need to be strengthened, or where ESS's remit may extend to areas beyond environmental law and policy but which still impact the environment and its condition.
- There was a substantial level of support for ESS's commitment to transparency and openness. Respondents sought clarification on how transparency will be implemented in practice, while also ensuring fairness to those being investigated.
- Respondents requested clarity about how ESS will become accessible to the public for raising concerns or representations, and how those making representations will be kept informed of progress. ESS was encouraged to work to reduce the institutional, social and cultural barriers experienced by marginalised groups to engaging in the work of ESS.
- A strong level of support was indicated for the adoption of informal investigations and resolutions, alongside requests for clarity on how the informal approach will be made transparent and the point at which the resolutions will be escalated to the formal approach.
- Respondents raised questions about the resourcing issues faced by public and other bodies, and the increase in resource requirements that the work of ESS will likely place on them through its role to regulate and scrutinise their work.
- Some respondents expressed support for ESS to have the ability to raise resource concerns as part of their reporting. Similarly, respondents raised concerns about the potential level of expectation placed on ESS and its own resources to manage a broad and crucial remit. Respondents emphasised that ESS should provide support and assist with securing resources to facilitate public authorities' compliance with environmental law.

Overall, respondents welcomed the important role ESS will assume in upholding and improving environmental law and asserted hopes that ESS would help Scotland establish more ambitious, internationally recognised, environmental standards. While many of the approaches, values and commitments outlined in the draft Strategic Plan were met with support, respondents gave numerous suggestions to strengthen the existing plan, with emphasis on transparency, communication, partnership working, and environmental protection. It was understood that ESS is a new organisation, with this in mind respondents asserted that ESS must maintain a clear sense of purpose to function effectively and drive forward environmental standards in Scotland.

## 1. Introduction

Environmental Standards Scotland (ESS) is a new independent public body, established by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. ESS exists to monitor the effectiveness of environmental law in Scotland, and public authorities' compliance with that environmental law, as well as to prevent enforcement gaps arising from the UK leaving the European Union.

Environmental Standards Scotland was established on 1<sup>st</sup> October 2021 and wants to improve the quality of the environment in Scotland and help achieve the highest environmental standards. The Draft Strategic Plan sets out how ESS as an organisation will work to deliver its purpose, including scrutinising, investigating, and securing improvements in public authorities' compliance with environmental law, the effectiveness of environmental law, and the way it is implemented and applied in Scotland.

In addition to feedback received from stakeholders throughout its first nine months of operation and on its Interim Strategic Plan, ESS launched an open consultation on its Draft Strategic Plan<sup>1</sup> in May 2022, through the Scottish Government's online consultation hub 'CitizenSpace'. Responses could also be submitted by email and post. The consultation on the draft Strategic Plan opened on 25<sup>th</sup> May 2022 and closed on 17<sup>th</sup> August 2022. A total of 40 responses were received to the consultation: 9 responses from individuals, and 31 responses from a range of organisations.

The consultation sought views and comments on ESS' Draft Strategic Plan, including inviting comments about ESS' approach to delivering its Strategic Objectives and to measuring performance and impact. Nineteen questions were asked of respondents, directly relating to each chapter of the Draft Strategic Plan, which set out how ESS intends to approach each aspect of its role, including communicating and engaging widely; analysing environmental performance and progress; investigating the most important concerns; and securing improvements.

This report summarises responses received to the public consultation, to inform the development of the final ESS Strategic Plan, which will be submitted to the Scottish Parliament for approval by 01 October 2022.

### Overview of consultation responses

A total of 40 responses were received through the consultation: 9 from individuals, and 31 organisational responses. Organisational responses included responses from Public Bodies (5 responses), oversight/scrutiny bodies (1 response), local authorities (4 responses), professional bodies (7 responses), non-governmental organisations (NGOs) (10 responses) and trade bodies (4 responses).

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<sup>1</sup> <https://consult.gov.scot/environmental-standards-scotland/draft-strategic-plan/> and <https://environmentalstandards.scot/wp-content/uploads/2022/05/ESS-Strategic-Plan-for-consultation-20220524-vA56578875.pdf>

	<b>RESPONDENTS</b>	
<b>LOCAL AUTHORITIES (4)</b>	Aberdeen City Council Dumfries and Galloway Council	Perth & Kinross Council Shetland Islands Council
<b>OVERSIGHT/SCRUTINY BODIES (1)</b>	Ethical Standards Commissioner	
<b>PUBLIC BODIES (5)</b>	Historic Environment Scotland NatureScot Public Health Scotland	Scottish Environment Protection Agency (SEPA) Scottish Government
<b>PROFESSIONAL BODIES (7)</b>	Association of Environmental Clerks of Works Chartered Institute of Ecology and Environmental Management Institution of Engineers in Scotland Law Society of Scotland	Royal Environmental Health Institute of Scotland Royal Town Planning Institute (RTPI) Scotland UK Environmental Law Association
<b>NON-GOVERNMENTAL ORGANISATIONS (NGOS) (10)</b>	British Association for Shooting & Conservation (BASC) Buglife Scotland Environmental Rights Centre for Scotland (ERCS) John Muir Trust Keep Scotland Beautiful	National Trust for Scotland The Royal Society for Protection of Birds (RSPB Scotland) Scottish Environment Link Scotland's Landscape Alliance Scottish SPCA
<b>TRADE BODIES (4)</b>	British Ports Association Chemical Industries Association	MPA Scotland Scottish Environmental Services Association

*Table 1: overview of organisational respondents*

Respondents had the option to respond to as many or few of the questions as they wished.

The number of substantive responses received to each question is included in the analysis. For counting purposes, comments such as 'no comment' or 'nothing to say' have been counted as a non-response, while responses with any further qualification (even if only e.g. 'no comment – agree') are counted as substantive responses.

## 2. Analysis and reporting

Researchers from the Social, Economic and Geographical Sciences Department at The James Hutton Institute were appointed by ESS to undertake an independent analysis of the consultation responses, and to write this report on the consultation responses.

As responses were invited in free text format (open questions), researchers adopted a qualitative thematic analysis on a question-by-question basis, identifying themes represented by respondents. To ensure consistency of approach, the first two rounds of questions were coded by two researchers together to ensure consistency of approach, and classifications of thematic codes were agreed.

All comments received in the consultation have been read and analysed by ESS staff, while this report presents a summary of the main issues raised in response to the questions asked. All responses, where permission has been given by the respondent to publish, can be found on the Scottish Government's consultation hub CitizenSpace: [consult.gov.scot](https://consult.gov.scot)



### 3. Responses to “Our Strategic Plan and Our Approach”

This section summarises comments received in response to questions relating to chapter 3 of the Draft Strategic Plan, outlining ESS’ Strategic Plan and Approach. Questions were asked relating to the following three sections, presented as the building blocks of the ESS Strategy.

- i) Vision and Mission Statement (question 1)
- ii) Strategic Outcomes (question 2) and
- iii) Values and Principles (question 3).

#### 3.1 Vision and Mission Statement

The proposed **vision** is: *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.*

The proposed **mission statement** is: *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.*



Figure 1: Proposed strategy building blocks from Draft Strategic Plan

Question 1 asked “Do you have any comments on our Vision and Mission Statement, set out in chapter 3?” 33 responses were received to this question: 7 from individuals and 24 from organisations.

Most respondents indicated broad support for ESS's vision and mission statement and welcomed the level of ambition outlined in the document. No respondents indicated clear dissatisfaction with the vision and mission statement.

Respondents suggested a number of additions to strengthen the vision and mission Statement. As well as a desire for 'telling a story' of Scotland's environment in a positive manner, suggestions included stronger articulation of ESS's role in protecting nature and the environment as well as people; clarification and a more inclusive approach regarding the terminology of 'community'; and clarification about terminology in relation to the definition and scope of ESS's work.

#### Balance of 'community', people, and emphasis on the environment

- Some respondents were uncomfortable with the use of 'communities' in the Vision Statement, given differing understandings and definitions of community. Alternative suggestions included the use of 'people and communities' rather than solely 'communities'.
- Other respondents suggested that referring to Scotland's communities implies too much focus on people, and instead the vision could be improved by omitting 'communities' altogether (hence encompassing protection of both people and the environment in 'Scotland benefits from...'), and/or ensuring that 'Scotland's people and nature' or 'people and environment' are explicitly referenced, to avoid too much emphasis on only human benefit.
- To emphasise the importance of nature and the environment, another suggestion included adding 'with rich biodiversity' to the vision. An alternative wording proposed by The National Trust for Scotland was: "Scotland's environment is managed and protected through the consistent application of effective environmental laws, safeguarding biodiversity, ecosystems and human health."

#### Further explanation of terminology used

- For both the vision and mission statement, respondents suggested including more clarity about words such as 'ensure' 'high quality', 'environmental laws', 'environmental standards' and 'harm.'

#### Strengthening the Vision and Mission Statements

- Suggestions to strengthen the vision and mission statements included giving more emphasis to the issue of enforcement, and more explicit statement of 'environmental standards' as well as laws.
- Ensuring the accessibility of ESS's services should be included in the Mission Statement, so people know how to raise concerns.
- The inclusion of continuous improvement was specifically welcomed, and two professional bodies suggested emphasising a consistently strong application of the law, rather than potentially consistent but weak application.
- Other suggestions included clarification on whether ESS can highlight gaps and shortfalls that are likely to go beyond 'public authority' compliance to involve the activities of private and third sector actors; drawing connection with other policy areas and legislation that impacts the environment; and including a commitment to work in close partnership on cross-border compliance issues.

### 3.2 Strategic outcomes

The proposed strategic outcomes listed in the consultation document as the intended results of ESS' work 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.

Question 2 asked "Do you have any comments on our Strategic Outcomes, set out in chapter 3?" which received 30 substantive responses, 7 from individuals and 23 from organisations.

Most responses to this question indicated broad support for the strategic outcomes described, although many, including those that indicated support, also suggested additions and/or clarifications to further specify the intentions, scope and efficacy of the strategic outcomes. Some respondents were concerned that the broad nature of the strategic outcomes, despite covering the focal areas of the ESS, makes measurement a challenge.

Suggested additions included defining 'environmental law'; incorporating communication and engagement with the public; articulating how and when outcomes will be measured; and providing support for public authorities in addition to the scrutinising role of ESS. NGOs were particularly concerned about supporting public awareness and engagement, defining environmental law appropriately and including a right to a healthy environment either in the strategic outcomes, or as part of the public's ability to engage with ESS to uphold their rights. Professional bodies indicated that wider treatment of the environment should be covered (rather than solely compliance with environmental law). The oversight body and local authorities highlighted the challenge of measuring the outcomes due to the current framing as described in the document. Trade bodies highlighted that different regulations and standards across Scotland, the UK, the EU and internationally should be taken into account.

#### Defining 'environmental law'

- Respondents requested a definition of 'environmental law' with questions about whether other relevant legislation would fall under the scope of improving the effectiveness of the law, where such legislation might relate to the environment. Respondents also raised concerns about the word 'effectiveness' when considering the impact of environmental laws to which public authorities will be expected to comply:

*“Implementation and application of, and compliance with, environmental law is one thing, but the question of whether environmental law is effective, per se, is a much wider one. An environmental law could be implemented, applied and complied with correctly, but it does not necessarily follow that the environmental law in itself is effective.” (SEPA)*

- Respondents suggested that the strategic outcomes should clearly reference the biodiversity and climate crises as well as protecting nature and the environment to strengthen the present framing.
- ‘Upholding the right to a healthy environment’ was also explicitly suggested for inclusion as a strategic outcome.

#### Communication & public engagement

- Eight respondents highlighted communication and engagement with the public, with the intention to support public awareness, could be a potential additional strategic outcome, or could be incorporated in the fourth point outlined in the Strategy.
- Several respondents suggested including an outcome about the ability of the public to raise concerns and have their rights upheld. Respondents asserted transparency, openness to public input, and dissemination of knowledge as necessary components for the efficacy of ESS.
- Another respondent reflected on the importance of communication with the public and stakeholders, but indicated that ESS must be clear about the organisation’s role and commitments to manage expectations appropriately.

#### Partnerships & enforcement

- Several respondents commented on the strategic outcome about partnerships highlighting areas of concern: recognition of different capacities of public bodies within Scotland and the rest of the UK; the importance of working with other organisations such as SEPA, NatureScot and the Scottish Government; and the significance of considering environmental regulation across other UK nations, the EU and internationally.
- Respondents recognised the emphasis on ‘ensuring’ and enforcing compliance and suggested a more positive framing might strengthen the strategic outcomes, whereby ESS could provide support for public authorities, not only scrutiny and enforcement. One respondent indicated that the use of ‘ensure’ when describing the role of ESS to scrutinise public authorities and enforce compliance might result in unnecessary liability issues.

### 3.3 Values and principles

ESS’s approach is informed by its values and principles. The proposed **values** (figure 2) set out the organisation ESS strives to be; and the proposed **principles** (figure 3) set out how it will approach its work.

Others view us as	Our staff feel
Independent	Respected
Transparent	Included
Trusted	Innovative
Effective	Collaborative

Figure 2: Proposed principles outlining how ESS will approach its work.

Question 3 asked “Do you have any comments on our Values and Principles, set out in chapter 3?” 30 responses were received, 8 from individuals, and 22 from organisations.

23 respondents indicated broad support for the values and principles outlined. A large proportion of respondents highlighted points for clarification, or suggested additions. Responses to this question particularly addressed the themes of partnerships, transparency, and proactivity.

Individuals, local authorities, and oversight bodies suggested strengthening the values by adding terms such as ‘empowered’ to the list. NGOs referenced working in partnership as an important principle and emphasised the need to incorporate environmental principles in the outline. Professional bodies agreed with the values, made some suggested additions to the principles, and recognised ESS’s approach to prioritising and targeting resources due to limited capacity. Public bodies and trade bodies commented on themes such as cross-boundary partnership working and the values of fairness and honesty.

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

Figure 3. Strategy building blocks as presented in the draft Strategic Plan

## Proposed values

- Respondents proposed a range of additional values that might supplement those proposed by ESS. The suggested values for the 'Others view us as' column included: approachable; fair; consistent; honest; and efficient. Suggested values for the 'Our staff feel' column included: valued; listened to; rewarded; supported; effective; and empowered.
- Transparency was emphasised as significant for maintaining the other values listed; other suggestions included 'innovative' and 'collaborative' as appropriate for inclusion in both columns.

## Proposed principles

### Principle 1: We will target our efforts and resources where we can add most value

- Four respondents recognised the necessity of prioritisation due to limited resources but expressed concern about less significant issues being neglected as a result.
- Clarification on the meaning of the terms '[add] most value' and '[make] most difference' was requested.
- Concern was also expressed about the framing of this principle as insufficient, as it appears to limit ESS to 'added value' which one respondent described as 'less than aspirational' while another respondent felt the overall focus should be a pro-active approach to driving improvements.

### Principle 2: We will seek to resolve issues through agreement wherever possible

- Respondents indicated support for principle 2 although there was a call for clarification on ESS's approach.

### Principle 3: We will be evidence-driven

- Of the few comments received to this point, respondents suggested that ESS should be aware of areas where data is not currently collected that may indicate areas of weak environmental performance.

### Principle 4: We will be open and transparent

- Transparency was considered essential for upholding all related principles and values, as well as being a standalone principle. Respondents suggested the following additions to strengthen the principle of transparency beyond keeping people informed and allowing for opportunities to input to the work of ESS;
  - Make documents publicly available
  - Make partnerships publicly available
  - Make any informal and formal resolutions publicly available
  - Uphold the transparency of other organisations working with ESS or fulfilling obligations related to environmental law and performance
  - Outline a framework for the public to have input, raise concerns and have their environmental rights upheld.

#### Principle 5: We will seek opportunities to work in partnership with others

- The effective management of partnerships through proactive leadership and support was considered important for progressing decision-making and timely action where necessary, as well as providing stakeholders and partners with sufficient support.
- A suggestion was made to change the terminology of 'partnerships' both as used here and across the strategy document. SEPA proposed alternative terms such as 'working relationships' or 'collaborations' that might be more appropriate to convey the multi-dimensional (supporting, scrutinising, and collaborating) relationship ESS will maintain with organisations.
- A suggestion was made to add 'cross boundary partnerships' to this principle to expand partnership working to organisations outside of Scotland on cross-boundary issues.

#### Other comments

- Two NGOs sought the inclusion of environmental principles such as those outlined in the Continuity Act (2021) and the five environmental principles: precautionary principle; integration principle; preventative principle; damage rectification at source principle; and polluter pays principle.

## 4. Responses to the proposed approach to delivering ESS's strategic objectives

This section summarises responses received about the proposed approach to delivery of ESS's strategic objectives including proposed approaches to:

- i) resolving matters informally with public authorities (question 4);
- ii) determining what constitutes a systemic failure (question 5);
- iii) determining whether a compliance failure could be addressed more effectively by a compliance notice than an improvement report (question 6);  
and
- iv) determining whether a compliance failure or environmental harm is serious (question 7).

### 4.1 Resolving matters informally with public authorities

Question 4 invited comments on ESS's proposed approach to resolving matters informally with public authorities, as set out in chapter 4 of the draft Strategic Plan. 28 responses were received to this question, 6 from individuals and 22 from organisations.

Responses indicated broad support for the approach although clarifications and additions were suggested, particularly about the reporting and communication of the outcomes from informal resolutions; identification of the appropriate timescales for both informal and formal resolutions; and questions regarding the inclusion of specific aspects of the Continuity Act (2021) in the approach. NGOs were particularly concerned about transparency and requested clarification on how ESS will uphold transparency in practice. Similarly, professional bodies commented that the publication of information should be part of ESS's transparent informal resolution approach and sought more detail on the term 'reasonable timescale'. Public bodies sought clarification about some terminology used, especially where the Continuity Act (2021) was mentioned.

#### Transparency & communication

- Several NGOs and others outlined concern that the strategy fails to state whether the outcomes of informal responses will be made publicly available, given that the document states clearly that the outcomes from formal resolutions will be published. Respondents emphasised the importance of indicating what information might be made publicly available and how it will report on informal resolutions, and in what circumstances information on these will be published or withheld.
- A number of professional bodies asserted that communication with the public, as well as the availability of information publicly, will be necessary for maintaining transparent informal and formal resolution processes. Additionally, public awareness of issues arising for informal resolution was considered important for ensuring the public can assist with reporting and monitoring compliance.
- A few respondents indicated that public authorities should be appropriately informed when under investigation and, if the informal resolution strategy is insufficient for motivating change, that a more formal approach will be taken.



## Timescale

- A number of respondents referenced the use of ‘reasonable timescale’ and suggested that the approaches outlined could be strengthened by defining a timescale for the fulfilment of resolutions for cases mediated by ESS.

## Continuity Act (2021)

- A number of clarifications were sought with reference to the alignment of chapter 4 with the Continuity Act (2021). Respondents requested clarification on the definition of ‘public authorities’ and, while it was noted that the frequent mention of public authorities in the document reflects their prominence in the Continuity Act (2021), there was concern that this focus might lead to a neglect of working with the private and third sectors. Respondents suggested that broadening the scope for working in partnership might be necessary given public authorities increasingly work alongside the private and third sectors on relevant issues.

## 4.2 Determining what constitutes a systemic failure

Question 5 asked ‘Do you have any comments on our proposed approach to determining what constitutes a systemic failure, as outlined in chapter 4?’ 21 responses were received for this question, 5 from individuals and 16 from organisations.

Respondents highlighted a range of areas for clarification and potential additions to strengthen the definition and approach to identifying systemic failures. The specific inclusion of environmental impacts and outcomes as part of the definition and identification of systemic failures was proposed. Additionally, respondents highlighted a preference for a proactive rather than retrospective approach to the identification of systemic failures, asserting that environmental harm is more likely to be prevented as a result.

### Defining systemic failure

- A number of respondents sought clarification of the definition and process for identifying what might be deemed a ‘systemic failure’, as well as the difference between an ‘administrative systemic failure’ and an ‘environmental systemic failure.’

### Environment

- Several respondents asserted that the approach to identifying and defining systemic failures should explicitly reference environmental impacts and outcomes, particularly the biodiversity and climate change crises.
- Respondents suggested that the absence of, or non-compliance with, environmental standards and targets should be included in the attribute list for systemic failures.

### Proactivity

- A proactive approach was considered important. Respondents indicated that earlier intervention to prevent environmental damage, where public authorities may not be complying with environmental law or standards, should be included in ESS’s approach to identifying systemic failures. Environmental Impact Assessments and consultation with communities, partners and other regulatory bodies were proposed as means for

ESS to integrate a more proactive stance within the strategy for identifying systemic failures.

- Respondents highlighted that ESS should play a crucial role in continually improving Scotland's environmental law and standards to keep up with international best practice, and identifying gaps in Scotland's environmental law and standards.

#### Transparency

- Respondents indicated that evidence supporting the decision to define a situation as a systemic failure must be transparent. The use of Environmental Impact Assessments and Strategic Environmental Assessments were suggested as accountable and transparent means for supporting such decisions.

#### Other

- It was suggested that as well as holding the powers to investigate systemic failures, ESS should also provide sufficient support and resource to assist local authorities with the prevention of systemic failures.

### 4.3 Determining whether a compliance failure could be addressed more effectively by a compliance notice than an improvement report

Question 6 asked '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?'. While many respondents had no further comments, 16 substantive responses were received, 4 from individuals and 12 from organisations. Respondents supported the proposed approach, and made suggestions to improve clarity, particularly on the definitions and proposed uses of compliance notices and improvement reports.

#### Further clarity about compliance notices and improvement reports

- Further clarification was sought about whether a compliance notice is about a systemic failure within a single public authority and an improvement notice for more than one public authority; or whether compliance reports will be issued for short-term issues (requiring action and resolution within e.g. 7 days) while improvement reports should be investigated and resolved within a longer time-frame (e.g. 1 month).
- The relationship between the use of compliance notices and improvement reports in systemic cases should be more clearly explained. Drawing on the case study about air quality in the proposed Strategic Plan, UKELA point out that multiple organisations could be involved in a systemic failure to comply with environmental law, and different responses may be suitable (for example, that compliance notices may be appropriate in some cases, supported by an improvement report directed to the related conduct of Government or other public bodies).

#### The role of judicial review

- One professional body expressed concern about the reliance indicated in some instances on judicial review, which it considered a weak, time-consuming and expensive mechanism to require a public body to carry out its duties, indicating

concern from its members that this reliance on judicial review could be a major weakness and may need addressing in the future.

### The role of Scottish Parliament in relation to ESS

- The relationship between ESS and the Scottish Parliament on improvement reports and plans was highlighted. In particular, given the Scottish Government may choose to depart from ESS's recommendations (as outlined in the Continuity Act section 30), albeit subject to parliamentary scrutiny, it was suggested that the relationship between ESS and the Scottish Parliament on this and other matters should be clarified in the draft Strategic Plan.

### 4.4 Determining whether a compliance failure or environmental harm is serious

Question 7 invited comment on the proposed approach to determining whether a compliance failure or environmental harm is serious, as set out in chapter 4 of the draft Strategy. 26 responses were received: 8 from individuals and 16 from organisations.

Several respondents welcomed the inclusion of both environmental harm and the *risk* of environmental harm in the Strategy. The main issues raised were concern about 'reversibility' as a factor to be considered, and about the potential cumulative impact of several ostensibly 'minor' harms. One local authority highlighted the likely wide range of technical knowledge and expertise that will be necessary to determine harm or risk thereof, and suggested that detail for the mechanisms to determine such harms would be of interest.

Other issues raised by NGOs included wider consideration of the implications of the matters subject to challenge, including the risk of non-compliance with environmental obligations (e.g. within international conventions), and an assessment of whether a compliance failure could contribute to environmental targets being missed. Other factors proposed included whether wildlife populations are affected; the addition of 'urgency'; the duration and consequences whether action is taken or not; the cost of remediation; and that further elaboration about the severity of impact could be stated as a separate point.

### Seriousness of environmental harm

- Further definition of the term 'environmental harm' was requested, such as through reference to relevant legislation or referencing baseline conditions.
- A number of respondents highlighted the potential for cumulative harm which can arise both from repeated failures in one geographical area, or where one or two incidents in an area are individually minor, but could lead to larger instances of harm. Respondents advised it would be useful to specify whether the difference between acute and chronic impact will be considered.
- The inclusion of the impact on wildlife populations was proposed, noting that if the harm affects endangered species, an incident should be treated with the utmost importance.
- UKELA expressed concern about why determining the seriousness of environmental harm relates to conduct, intention or negligence of a public authority, rather than the environmental consequences (paragraph 4.20 of the draft Strategic Plan). Such

factors were however identified as important in determining whether the circumstances overall are serious enough to justify judicial review.

- Other respondents supported the factors listed, and suggested the conduct of the public authority during the investigation could also be included in determining whether conduct is flagrant or deliberate.

#### Reversibility of harm if action is not taken

- Several respondents including NGOs and professional bodies explicitly disagreed with the inclusion of reversibility as a factor to be considered in an assessment of seriousness of environmental harm. While there was some understanding that reversibility could be seen as a positive factor in that the environmental harm could be removed, respondents expressed concern about the use of reversibility, as its inclusion suggests that the environmental harm will be allowed to take place. A more preventative and proactive mitigation approach was encouraged to avoid environmental harm in the first instance.
- The size, scale and significance of the harm were considered important factors to be taken into account and it was suggested that further clarity should be added that there may be instances where only one factor is relevant for determining seriousness of harm (or risk thereof).

#### Clarifications suggested

- Further explanation of terminology such as 'flagrant' and 'deliberate' conduct, and 'conduct demonstrating negligence' and 'negligence' was sought.
- Respondents from the legal profession highlighted that the concept of 'negligence' on the part of a public authority leading to judicial review, draws notions of private law into the public law realm. The Law Society of Scotland also highlighted the potential difference between 'neglect' (not taking action or omitting to do something it should) and 'negligence' (deliberately not doing something) and asked for greater clarity about the intended meaning of 'negligence.'

## 5. Responses to the proposed approach to investigating environmental concerns

ESS outlined its intended strategic outcomes and key guiding principles for its proposed approach to investigating environmental concerns. Question 8 invited responses about whether, and how, ESS should prioritise and carry out its investigations. 26 responses were received to this question: 9 from individuals and 17 from organisations.

Respondents were broadly supportive of the proposed approach. In addition to requests for suggestions and clarification of some of the terminology in chapter 5, the most common issues identified by respondents were:

- i) clarification about the prioritisation of informal resolution
- ii) concern about the implication of adopting more formal practices at an early stage of investigation
- iii) concern about issues of resources (particularly human and financial) and resourcing of organisations and implications for compliance; and
- iv) welcoming a commitment to transparency through the review process.

### Definitions

Several concerns about the wording used in chapter 5 of the draft Strategic Plan were outlined, with a number of respondents requesting further clarification about specific terms ‘importance’, ‘neglect’ and ‘added-value’ used by ESS in determining the factors taken into account when considering an investigation. Other phrases used which respondents felt would benefit from further explanation included ‘seriousness’ ‘allegedly serious’ and ‘potentially serious’, ‘biggest difference’, ‘updated regularly’ and the ‘significance of the environmental feature affected.’ Respondents also sought information about the benchmarks, tools and methods used to make these assessments.

### Importance

- Additional factors proposed for the question of ‘importance’ included consideration of whether a matter threatens national targets for carbon, climate change and biodiversity; impacts on communities and fragile ecosystems; and time-sensitivity and the need for an immediate response. Respondents also suggested matters with the potential for serious harm should be prioritised, as well as the inclusion of welfare risks to wildlife or farm animals, as a priority reason to investigate.
- Reference could also be made here to the relevant legislation, and collaboration with appropriate agencies.
- Cumulative harm was considered particularly important, and an explicit approach for identifying and prioritising cases of cumulative environmental harm was recommended.

### Neglect

- Representatives of the legal profession again advised that the terms ‘neglect’ and ‘negligence’ have specific meanings in legal contexts that may not be appropriate in the contexts addressed by ESS.
- Duplication of the words ‘importance’ and ‘neglect’ in paragraphs 5.2 and 5.3 of the draft Strategic Plan were also highlighted, implying lack of clarity around these issues. Given

the importance of these factors as indicators for the transparency of ESS's decision-making and processes, respondents also recommended that a more 'methodological' treatment of these factors is developed.

- It was also suggested that investigation of instances of neglect should include scrutinising the capacity and resources (including skills, expertise and budgets) of public bodies to deliver Government ambition.

### Gathering evidence, prioritising and carrying out investigations

Clarification was sought about the process of investigations, and the prioritisation of informal resolution, with many organisations expressing a willingness to be involved at the early stages of investigation.

- It was advised that it will be important to set reasonable expectations on those making representations about what ESS can do in response to a representation.
- Some clarification about the process was requested, including explicitly mentioning the information-gathering phase from the public authority or authorities as part of the preliminary review phase, and clarifying that engagement with public authorities will generally occur before, as well as after, a decision is made to investigate.
- The ERCS suggested adding a 'call for evidence' from members of the public, and opening an alternative channel for people to log concerns. Such processes could help identify issues of concern for future investigations, and potentially address hurdles to people making representations.
- The Royal Environmental Health Institute of Scotland indicated a desire that should investigation prove that compliance with legislation is simply not possible (due to measures outwith a public authority's control), ESS will take appropriate action such as changes in (or variance/exemptions from) legislation, rather than formal action on public authorities.

### Use of Information Notices

- A number of respondents including SEPA and NatureScot raised specific issues in relation to the use of Information Notices as outlined in the draft Strategic Plan. Concern was expressed that this section implies a wider and more rapid use of formal routes of engagement than intended in the legislation, rather than recognising there is an initial informal evidence-gathering phase.
- Responses from a range of public bodies emphasised the expectation that Information Notices would be a 'backstop' position, should cooperation in the sharing of information fail. Respondents were keen that ESS should include detail in the Strategic Plan that Information Notices will be a final resort should a public authority not be responding to requests for information.
- The potential resource implications for public bodies in responding to formal Information Notices was considered substantial. Potentially significant consequences for failing to comply with a notice were raised, as well as the limited exceptions available to public authorities. Further guidance was thus requested about when ESS will consider it has a 'reasonable requirement' for requiring information to be provided; when ESS may be likely to take enforcement action; and what ESS may consider a 'reasonable excuse' for failing to comply.

## Resourcing issues

- Resource pressures and constraints were identified as a concern for prioritisation and for responding to investigations. A small number of respondents raised concerns about the human and financial resources available to public bodies and local authorities to mitigate environmental failures or non-compliance. A question was raised about how ESS will secure compliance and effectiveness where non-compliance is a result of financial and human resource limitations.
- A recommendation was made that it should be within the powers of ESS to ensure such public bodies are sufficiently resourced, and that ESS should be able to identify gaps or under-provision that should be addressed.
- While welcoming the intention to seek advice from specialists and technical experts, respondents also emphasised the importance of ESS staff having the relevant skills and expertise to act as a bridge between legal experts and environmental specialists. Suggestions to build capacity at ESS included encouraging staff to undertake training and secondments, including opportunities for placement in organisations such as the Scottish Public Services Ombudsman.

## Keeping parties informed and publishing active and completed investigations online

- The commitment to publishing details of active and completed investigations online was welcomed, in line with the principle of transparency and openness. Emphasis was placed on the importance of informing and updating the public about the status of investigations, as well as the parties directly involved in an investigation. Further clarification about how the public will be informed of issues that have been considered, but not given rise to a formal investigation was requested, as well as detail about issues where early approaches have led to an informal resolution.
- A small number of respondents suggested that the Strategic Plan (or another ESS document) should explicitly address issues involving confidentiality, the disclosure of information and fairness to the authority being investigated. More detail about potential exceptions to the requirement that ESS must not disclose certain information obtained was called for.

## 6. Responses to the proposed approach to monitoring and evaluating environmental performance and change

Respondents were invited to comment on the proposed set of initial analytical priorities, and to suggest key sources of data or intelligence that ESS should be considering. Additionally, respondents were asked to comment on:

- i) proposals for monitoring compliance and effectiveness, and taking account of different types of information (question 9);
- ii) draft priority topics for further analysis and suggestions for key sources of data and intelligence that ESS should consider (question 10).

### 6.1 Proposals for monitoring compliance and effectiveness, and taking account of different types of information

Question 9 invited comments on ESS's proposals for monitoring compliance and effectiveness, and taking account of different types of information, as set out in chapter 6. 26 comments were received in response to this question: 6 from individuals and 20 from organisations.

While over a quarter of respondents directly stated support for the approach outlined, a larger number of respondents also highlighted points for emphasis and/or clarification, taking the opportunity to highlight different partnerships and sources of data that might be relevant. A few respondents indicated challenges that ESS should be aware of when implementing the strategy. Respondents of all categories welcomed partnership working as beneficial to the proposed approach. NGOs also highlighted the importance of transparency as fundamental to the efficacy of such an approach.

#### 'Keeping pace' with EU environmental standards

- Respondents emphasised the importance of the statement that "Scotland is 'keeping pace' with environmental standards in the European Union" (paragraph 6.2, page 19), asking for further clarifications about issues such as the procedures for how 'keeping pace' might be monitored and indicating this may be a challenge for ESS to overcome.
- Respondents also sought the addition of compliance and 'keeping pace' with UK and international standards to the approach rather than solely referencing EU standards.

#### Data sources and partnerships

- A number of respondents indicated that ESS should consider existing monitoring and evaluation work appropriate to Scotland, as well as suggesting a range of data sources including local volunteers, representations from the public, citizen science and participatory initiatives, scrutiny bodies, NGOs and universities.
- Partnerships were viewed as essential for effective environmental monitoring. Such partnerships, including cross-boundary partnerships in the UK, were suggested as a means for gathering existing and future data, as well as for identifying gaps and avoiding duplication.
- Existing strategies and bills that may be relevant for evaluation were suggested, including: 'Our Place in Time' the Historical Environment Strategy for Scotland, the



Scottish Biodiversity Strategy, the Circular Economy Bill, and the Natural Environment Bill.

- Transparency was again brought up by respondents as a necessary component of the approach. Further actions to uphold the transparency of ESS were suggested, such as a publicly available list of potential partner organisations.

#### Clarifications

- One public body sought alteration to Figure 7 (Environmental Topic Areas) (p21 of the proposed Strategic Draft), emphasising that ‘cultural heritage’ with ‘population and human health’ should be understood as independent topic areas.
- Another respondent highlighted concern about how ESS will ensure the concerns raised by members of the public can be used to assist with horizon scanning work.

## 6.2 Comments on draft priority topics for further analysis and suggestions for key sources of data and intelligence that ESS should consider

Question 10 invited comments on the draft priority topics for further analysis, and suggestions for key sources of data and intelligence that ESS should consider. 32 responses were received to this question, 5 from individuals and 27 from organisations.

Respondents welcomed the range of draft priority topics and the ambition contained therein, although many also emphasised the interconnected and interdependent nature of environmental challenges and the need to recognise overlaps and avoid silo-ed thinking. One respondent outlined their hope that ESS will take a holistic approach to the proposed priority topics, including the regulatory and practical barriers, and identifying potential areas of conflict between topics.

Some respondents expressed reservations about the high-level nature of areas presented in the draft Strategic Plan, and many suggested they should be further refined. The most frequently mentioned issue was ‘water’, which several respondents suggested should be divided into two separate issues – water/freshwater, and marine issues. Other issues raised included consideration of how emerging issues can be accommodated and a suggestion to include timescales against which the priorities are anticipated to be addressed.

SEPA advised that it would be helpful if ESS could explain the process it will use to narrow the scope of what it will prioritise, and the weighting (if any) applied to the criteria for prioritisation. The addition of reference to relevant legislation, frameworks, and goals, such as the Sustainable Development Goals and the National Performance Framework was also advised.

Some of the key issues raised in relation to the priority issues outlined in section 6.13 of the draft Strategic Plan include:

#### Biodiversity

- A number of organisations pointed out the importance of biodiversity for scrutiny given the complexity of interrelating issues, and the importance of a range of policy areas for improving performance. Specific examples suggested include: the

effectiveness of deer management legislation; compliance with proposals for licencing grouse moors; and questions about how positive effects for biodiversity will be measured consistently around Scotland. The importance of protected areas including Sites of Special Scientific Interest (SSSIs) and Local Nature Conservation Sites was highlighted.

- A number of other suggestions here included reviewing protected areas and habitat connectivity; review of pressures on land and development of land management objectives to maximise gains to biodiversity, climate and people; access to local quality landscape and greenspace as a right for population health and wellbeing; the opportunity to review the effectiveness of restoration efforts (e.g. peatland restoration and tree planting); and the need for ambitious, legally-binding targets to secure nature.

### Land and soils

- One NGO explicitly welcomed the inclusion of 'land and soils' as one of the priority topics, suggesting this topic should cover land use and planning development, with reference to native habitats, their protection and restoration.

### Population and human health

- Further detail was requested about whether the objective relates to all environmental noise or specific areas such as night-time noise, industrial noise or traffic noise. The Law Society of Scotland emphasised the challenges of the application of the law and assessing data in regard to noise and welcomes engagement in this area.

### Resource use and waste

- The inclusion of resource use and waste as a priority was welcomed by several respondents including the Law Society of Scotland, Scottish Environmental Services Association and Keep Scotland Beautiful. The inclusion of the prevention of waste crime within this topic area was specifically welcomed, noting it links with Population and Human Health as well as Cross-cutting Environmental Governance.

### Water

- A number of NGOs recommended separating water into two priority issues, marine and water/freshwater, given they are large topics with different drivers, pressures and solutions. Professional bodies suggested strengthening the priority of water through including information relating to the levels of nutrients in freshwater and the condition of freshwater habits beyond just wastewater discharge, as well as including water pollution, flooding, diffuse pollution from agricultural land-use and sewage outflows into water courses, as important matters to address and areas of high public concern.

### Cross-cutting environmental governance

- A number of respondents suggested reference to particular environmental agreements and bills (e.g. the Aarhus Convention; the forthcoming Levelling Up & Regeneration Bill; the Natural Environment (Scotland) Bill; the forthcoming Scottish

Biodiversity Strategy and the Scottish Agricultural Policy), and a suggestion was made to focus on policies in development, given their long-lasting potential impact.

### Additions

- SEPA recommended the addition of flood risk as a priority topic, either under Water or Climate change, or both, while RSPB Scotland suggested an additional topic group of Planning or Built environment. Keep Scotland Beautiful suggest greater prioritisation should be given to Local Environmental Quality (LEQ) within the draft priority topics, likely within the topic of Resource Use and Waste.

### Data sources

Many organisations including public bodies, professional bodies, trade organisations, and NGOs indicated a clear desire to support ESS through the provision of data and facilitation of stakeholder access to enable regular dialogue and ensure all parties are informed of developments. Respondents highlighted a range of reports, data sources and emerging evidence that could be useful to support the future work of ESS.

## 7. Responses to the proposed approach to engaging and communicating effectively

ESS outlined its intention to engage widely to promote awareness of its role, to ensure that it is well-informed about concerns about compliance and the effectiveness of environmental law, and that it is engaged in discussions about forthcoming changes and reform in Scotland and beyond. Respondents were invited to comment on:

- i) the proposed approach to avoiding unnecessary overlap with other regulators, oversight and scrutiny bodies (question 11)
- ii) the proposed approach to receiving and handling representations (question 12).

### 7.1 Comments on the proposed approach to avoiding unnecessary overlap with other regulators, oversight and scrutiny bodies (question 11).

Question 11 asked ‘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?’ 26 responses were received to this question: 6 from individuals and 20 from organisations.

Respondents broadly welcomed the outlined approach to avoiding unnecessary overlap with other regulators, oversight and scrutiny bodies and welcomed the commitment to establishing Memoranda of Understanding (MoUs) with existing regulatory bodies. Responses focused on the significance of collaboration as part of ESS’s approach, suggesting additional organisations to strengthen collaboration and avoid duplication of work. Additionally, respondents reflected on the Communications Strategy, highlighting the importance of communication in minimising duplication.

#### Collaboration and communication

- The proposed approach details that ESS will consider “other advisory, oversight and scrutiny bodies” when determining appropriate communication and collaboration arrangements. UKELA and the Chartered Institute of Ecology and Environmental Management, among others, were broadly supportive of this approach and referred to this commitment when suggesting additional organisations and individuals to consider, including: the Scottish Public Services Ombudsman, Audit Scotland, the Commissioner for Ethical Standards in Public Life in Scotland, the Scottish Information Commissioner, Marine, Scotland, the National Planning Improvement Coordinator and Police Scotland.
- Addressing cross-border issues and cross-border protected areas was raised, with respondents suggesting ESS should develop a strategy for addressing such issues alongside organisations such as the Office for Environmental Protection and the Interim Environmental Protection Assessor in Wales.
- Communication with other organisations and the public was highlighted as essential for maintaining trust and respect, and for avoiding duplication or contradictory messaging, and maintaining transparency.

## Clarification and concerns

- Respondents requested further definition of the term ‘public interest’ and explanation of the ‘limits’ to openness and transparency under the Continuity Act.
- While the use of MoUs for clarifying areas of responsibility was welcomed, more detail about potential areas of overlap with other bodies such as SEPA, and on the relationship and role in relation to local authorities, particularly where the public seeks to raise concerns or complaints, requires further consideration. One trade body indicated that ESS should avoid ‘double regulation’ and only intervene if existing regulators are failing in their duty.
- A suggestion was made to include a simplified diagram to visualise and clarify the relationships and responsibilities with other regulators, oversight and scrutiny bodies.
- Concerns were raised about the need to provide signposting to ensure public complaints reach the appropriate organisation, an issue which prompted one individual to suggest the inclusion of a “formal handover procedure” where issues might be passed between organisations.

## 7.2 Comments on the proposed approach to receiving and handling representations

Question 12 invited comments on the proposed approach to receiving and handling representations. 16 responses were received to this question: 4 from individuals and 12 from organisations.

There was broad support for the proposed approach and willingness to assist with the work of ESS where possible. Additional suggestions about clear communication of the responsibilities, remit, and limits of ESS’s role were emphasised.

- The use of online forms was welcomed, although respondents commented that it will be important to ensure engagement processes are accessible, particularly for marginalised groups.
- A number of respondents emphasised the importance of raising public awareness about ESS and its role, as well as limitations to its remit.
- Ensuring clarity about the limits of ESS’s remit and highlighting differences with other oversight bodies elsewhere in the UK was also mentioned. Respondents emphasised the need to avoid confusion about agency roles and responsibilities, and to manage expectations of stakeholders and the public in relation to receiving and handling representations.
- Respondents welcomed and emphasised the importance of the transparent and open approach outlined. Clarity about timelines for responses to enquiries and standards for communication were suggested to help build trust in processes and demonstrate transparency. One professional body suggested ESS should publish information about the number and subject of representations received in a context that clarifies the role of ESS and its approach to prioritisation.
- Two respondents expressed concern that ESS could provide too much information on active investigations such that could be considered unfair against those being investigated. Appropriate and robust safeguards to ensure any pre-emptive conclusions, or detail which may break confidentiality regarding live cases should not be made publicly available until a conclusion has been reached.

## 8. Responses to the proposed approach to developing a high performing organisation

As a public body, accountable to the Scottish Parliament, ESS has a legal duty to report on its activities each year. Question 13 invited respondents to reflect on the approach for “developing a high performing organisation” as outlined in chapter 8 of the draft Strategic Plan. 16 substantive responses were received to this question: 5 from individuals, and 11 from organisations.

While a handful of respondents explicitly welcomed the commitments outlined, most responses to this question suggested additions to strengthen or clarify the commitments. Individuals that responded to this question focused on the topic of staffing resource and capacity, whereas other respondent categories commented on a range of areas including:

- Reference to diversity and inclusion in the governance structure and further discussion of the “leadership role” that ESS might assume given its organisational purpose to scrutinise public bodies’ compliance with environmental law and standards.
- Further clarification on the definition and measurement of “high performing”.
- Emphasis on collaboration with other organisations, NGOs and public bodies for identifying compliance gaps, sharing best practice, and gathering diverse and transparent contributions.
- A proposal that “regular, independent review” might strengthen the ambition to be a high performing organisation.
- Ensuring effective external communication, with one respondent suggesting a communication plan should be aligned with the ‘customer journey’, to enable a range of communications routes for individuals as well as businesses and public authorities.
- Raising concerns about the limited staffing levels and capacity implied by the details in Chapter 8, with respondents raising questions about how ESS might establish “realistic and achievable” priority areas with appropriate timescales for fulfilment, and negotiate sufficient budget, where an increase in cases represented to ESS might arise.

*“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.” (Public Health Scotland)*

## 9. Responses to the Proposed Approach to Measuring Impact

The Draft Strategic Plan includes a proposal to implement a performance management framework to help identify how ESS is helping deliver improvements to environmental outcomes in the real world, by improving compliance with and/or the effectiveness of environmental law in Scotland. The Draft Strategic Plan includes a proposed framework, logic model and key performance indicators.

In relation to chapter 9, respondents were asked to comment on:

- i) ESS' approach to measuring impact (question 14), and
- ii) the proposed key performance indicators (Annex B of the draft Strategic Plan) (question 15).

### 9.1 Comments on the proposed approach to measuring impact

A range of views were received in response to question 14 inviting comments on the proposed approach to measuring impact outlined in Chapter 9. 19 responses were received, 5 from individuals and 14 from organisations.

While a handful of respondents stated clear support for the outlined approach, most raised points for clarification and requested additional information. NGOs in particular referenced paragraph 9.5 (regarding public authorities' response to recommendations from ESS), for further clarification, while public bodies reflected on the potential challenges of measuring outcomes.

- Respondents suggested additions to strengthen the approach, including reference to the National Performance Framework and the Sustainable Development Goals.
- ESS's commitment to long-term environmental outcomes for Scotland was welcomed. The Law Society of Scotland suggested that not only the quantity of representations received should be published, but also the topics covered by representations.
- Four respondents sought further clarification and strengthening of the wording of paragraph 9.5 (regarding the implementation of recommendations by public authorities), indicating that the present wording implies public authorities may choose whether to act on recommendations given by ESS.

### 9.2 Comments on the proposed key performance indicators (question 15)

Respondents were invited to comment on the key performance indicators outlined in Annex B of the document. 21 responses were received to question 15: 5 from individuals and 16 from organisations.

Responses suggested areas to strengthen the focus of the key performance indicators and clarify how ESS will appropriately measure impact. While a range of topics were referenced, individuals and local authorities were particularly concerned about the measurement of performance indicators, NGOs emphasised the inclusion of communities and the environment, and professional bodies sought clarification on the framing of the key performance indicators. A handful of respondents reflected on challenges and concerns

related to the potential difficulties of measuring outcomes and applying Key Performance Indicators (KPIs) in practice. Issues included concern that the KPIs as written focus on “activity rather than effectiveness”; a lack of timelines; and challenges in measuring impact in a changing world.

#### Communities and Environment

- Several respondents asserted that the key performance indicators should cover environmental protection, impact and improvement, suggesting various elaborations to strengthen the focus on the environment, and referencing statutory targets for biodiversity and climate change.
- The National Trust for Scotland, among others, proposed the addition of a KPI related to the right to a healthy environment:

*“... it is important not to lose sight of the point of all this, namely that Scotland's communities benefit from a high quality environment and are protected from harm. There needs to be a clear thread and connection demonstrated through your actions that this is being achieved.”* (Shetland Islands Council)

#### Measurement of Outcomes

- A large proportion of responses sought clarification regarding the measurement of outcomes associated with the key performance indicators. Various respondents asserted that the key performance indicators should incorporate the number of representations raised and resolved informally, further suggesting that the outcomes from such resolutions should be quantified (in terms of proportions as well as absolute numbers), in addition to measuring the implementation of resulting recommendations.
- Respondents suggested that the key performance indicators should be reflected in context of environmental standards and with reference to suitable benchmarks or baselines, and that it may be appropriate to review the utilisation and suitability of indicators as environmental standards and ESS's workload changes over time.



## 10. Other final comments and next steps

ESS sought feedback on additional questions relating to their next steps of development. These questions asked:

- i) whether there are any other factors that ESS should consider before exercising its functions (question 16); and
- ii) whether respondents had any other comments on the draft Strategic Plan and the proposed approach to fulfilling their remit (question 17).

### 10.1 Other factors that ESS should consider before exercising its functions

Respondents were invited to suggest further factors for consideration before ESS proceeds with implementation of the strategy. 11 responses were received to this question: 5 from individuals and 6 from organisations.

A range of suggestions were made, including: organisational relationship mapping to give an overview of how ESS might work with existing public, private and third sector bodies; recognition of and reflection on the barriers to access to raise concerns; consideration of the limited resources available to ESS and other public bodies and how this might impact the level of ambition the organisation can maintain; consideration of the causality of non-compliance with environmental law; and inclusion of environmental protection and/or harm with specific reference to Sites of Special Scientific Interest, and the diversity of landscapes, wildlife and biodiversity among others.

### 10.2 Other comments on the draft Strategic Plan and the proposed approach to fulfilling ESS's remit

A broad range of comments were received from the 17 respondents (4 individuals; 13 organisations) offering other comments about the proposed approach to fulfilling ESS's remit.

The issues of working relationships with other organisations; the right to a healthy environment; the engagement of public and private sectors; links with other legislation and the responsibilities of ESS regarding future environmental legislation were each highlighted in a small number of responses. Two respondents took additional time to welcome the amount of work put into the development of the Strategic Plan, and the level of ambition contained therein.

#### Working with partners and the remit of ESS

- Some respondents felt that more attention should be paid to the strategic question of how ESS will work with others, and to the interface between Scotland and the UK, and the Office for Environmental Protection. Clarity about the division of competences and responsibilities between the Scottish Government, and primary regulators such as SEPA, NatureScot and local authorities on the one hand and ESS on the other should be included in the Strategic Plan. UKELA also suggested including clear information that ESS is not a 'front-line' body with direct responsibility for the situation on the ground to be included early in the Strategic Plan.

### The right to a healthy environment

- Two respondents raised the importance of the role of ESS in advancing the right to a healthy environment including access to quality landscapes and greenspaces for health and wellbeing; land management objectives for climate change and biodiversity; and protecting communities from harm, which had been emphasised by NGOs elsewhere in their responses.
- The ERCS advised including reference to the measurements that ESS will take to reduce the institutional, social, and cultural barriers experienced by marginalised groups in relation to the work of ESS, and clarification of how ESS will prioritise its work and interventions to advance environmental justice.

### Engagement of public and private sector

- Two respondents highlight the role of private as well as public organisations in upholding environmental standards and law, given that the public, private and third sectors are much more integrated than previously.

### Links with other legislation

- A number of respondents sought further clarity about whether ESS will have a formal role when future legislation and policies are being considered, and the Strategic Plan could include some direct reference to the potential wider role for ESS in terms of monitoring and reporting on progress in other policy areas that impact the environment and identifying opportunities for new legislation.

### Freedom of Information requests

- One public body expressed concern that there is insufficient reference to Freedom of Information/Environmental Information Regulations in the Strategic Plan, both how ESS expects to manage requests, and the implications on public authorities in providing evidence which they would not normally publish.

### Cultural heritage & public health

- Two respondents highlighted the importance of protecting cultural heritage, including Scotland's landscapes, to make the work of ESS more visual and relatable, while another emphasised the importance of clarification of the difference between environmental impact and environmental impact with potential to affect people and health outcomes.

## 11. Responses to impact assessments (Annex A)

ESS undertook a number of impact assessments in relation to the potential of the Strategic Plan, and what it says about how ESS intends to carry out its role. In its consultation, ESS invited comments on the interim conclusions of their impact assessments (question 18). A further question relating to Impact Assessments was to invite respondents to suggest any sources of information that ESS should be using to assess the potential impact of the Strategic Plan (question 19).

### 11.1 Comments on the interim conclusions of the impact assessments

Only 7 responses were received to this question: 4 from individuals and 3 from organisations.

Two respondents expressed concern about the decision that a Business and Regulatory Impact Assessment (BRIA) is not yet required and suggest this decision may need to be revisited. The finding that the ESS Strategic Plan will not impose new or additional costs of public sector organisations was considered particularly concerning, given experience in collaborating with and responding to ESS to date. Both respondents felt the remit of ESS and its proposed methods of operating are in some respects different to, or wider than, the EU's scrutiny role and that ESS may undertake investigations that might not have been a priority for the EU. Concern was expressed about the likely cost implications for public bodies and businesses in providing information to inform investigations and participating in investigations, from ESS's undertaking of its purpose.

### 11.2 Other sources of information suggested to assess the potential impact of the Draft Strategic Plan

Only 6 substantive responses were received to this question: 2 from individuals and 4 from organisations.

One local authority recommended the use of recognised external benchmarks and quality assurance approaches (e.g. ISO9001 or ISO45001, or CharterMark, Best Value, Better Regulation frameworks etc), much of which emphasises the importance of consultation with stakeholders and interested parties such as businesses the public, and which emphasise prevention, outcomes and continuous improvement as key considerations.



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