

Edward Mountain MSP
Convener
Net Zero, Energy and Transport Committee
Scottish Parliament
Edinburgh
EH99 1SP

14 October 2022

Dear Mr Mountain

NET ZERO, ENERGY AND TRANSPORT COMMITTEE, 25 OCTOBER 2022

1. Environmental Standards Scotland (ESS) welcomes the opportunity to support the work of the Committee at its meeting on 25 October 2022.
2. ESS has been in existence since 1 October 2021. It is a key component of the system of environmental governance in Scotland following the UK's exit from the European Union. Its remit is to:
 - ensure public authorities, including the Scottish Government, public bodies and local authorities, comply with environmental law
 - monitor and take action to improve the effectiveness of environmental law and its implementation.
3. Existing and proposed legislative changes at both a UK and Scottish level are relevant to that system. This statement sets out this context and how it relates to ESS' work. In summary:
 - Following the UK's exit from the European Union, there is significant change and uncertainty in the framework of environmental legislation, especially at the interface between the UK and Scotland.
 - Some of these changes at the UK level (the Internal Market Act 2020, the Retained EU Law (Revocation and Reform) Bill and the Levelling Up and Regeneration Bill) may constrain Scottish Ministers' ability to operate independently. In addition, they may limit Scottish Ministers' ability to meet their objective of maintaining alignment with policy and legislative developments at a European level.

The Internal Market Act

4. The UK Internal Market Act 2020 introduces principles of mutual recognition and non-discrimination to enable the flow of goods and services across the UK. The Internal Market Act means that these principles apply by default to new legislation and regulations, except where divergence has been agreed. The UK Withdrawal From The European Union (Continuity) (Scotland) Act 2021 (the “Continuity Act”) allows Scottish Ministers to maintain alignment with European law on non-reserved matters through secondary legislation. The Internal Market Act 2020 could limit Scottish Ministers’ ability to enforce new regulations to keep pace with European law where they relate to a subject where the UK and/or other devolved administrations have taken a different approach.
5. The UK Government retains the power to negotiate and agree international trade agreements. Trade deals would not prevent Scottish Ministers from applying higher regulatory standards in Scotland. However, the market access principles in the Internal Market Act 2020 and the nature of international trade agreements would mean that they such higher standards could not be applied to imported goods.
6. ESS’ role is to scrutinise compliance with and the effectiveness of environmental law in Scotland, including whether it is achieving its intended environmental outcomes. The Internal Market Act 2020, and its potential impact on regulatory standards in Scotland, is an issue that ESS will take into account when considering the scope for improvement of compliance or the effectiveness of environmental law in Scotland and in the extent to which Scottish environmental legislation is keeping pace with European environmental legislation.

Common Frameworks

7. ESS notes the need for common frameworks for key policy and regulatory areas where returning EU powers are within devolved competence. We are supportive of the principle of mutual agreement between the UK and devolved governments on areas of regulatory consistency as established by the Joint Ministerial Committee (European Negotiations) (JMC(EN)) in October 2017.
8. ESS recently laid an [improvement report relating to air quality](#) (and specifically, nitrogen dioxide) in the Parliament. The report made a series of recommendations to ensure more effective application of environmental law in this area. Improving air quality more widely is a complex issue, but ESS considers that its recommendations to strengthen the operational and governance arrangements for air quality management will contribute positively towards this. If the Scottish Government decides to keep pace with EU plans to reduce limits for nitrogen dioxide further, this will have to take place within the context of the the common framework for air quality.

The Retained EU Law (Revocation and Reform) Bill

9. The UK Government’s proposed Retained EU Law (Revocation and Reform) Bill will remove all European law from the UK statute book by the tenth anniversary of the referendum on EU membership (23 June 2026). There are estimated to be around 2400 pieces of retained EU law, with approximately 570 directly related to the environment,

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food and rural affairs. The bill will ‘sunset’ the majority of retained EU law by the 31 December 2023, with the remainder either reformed or retained in agreement with devolved administrations. This includes removing the supremacy of EU law, general principles of EU law and directly effective EU rights. Any retained legislation will be assimilated into domestic law, with UK and Scottish Ministers given powers to amend, repeal and replace retained EU law and assimilated law more easily.

10. Scottish Ministers have raised objections about the pace and scope of changes and the potential impacts on devolved decision-making. The bill may lead to conflicts with Scottish Government’s ambition and capacity to keep pace with EU policy and legislation. It also has the potential to affect environmental standards in Scotland. The bill enables UK Ministers, rather than the UK Parliament, to alter the regulatory and legal framework in the UK. The scale of change implied by the UK Government’s Retained EU Law (Revocation and Reform) Bill will likely place significant demands on both UK and Scottish Governments and on time in both the UK and Scottish Parliaments.
11. ESS’s role is to monitor compliance with, and the effectiveness, of environmental law. The implications of the Retained EU Law (Revocation and Reform) Bill will therefore be of significant relevance to our work, especially as one element of our role is to assess how the Scottish Government is keeping pace with European environmental policy and law.

The Levelling Up and Regeneration Bill

12. The UK Government’s Levelling Up and Regeneration Bill may have implications for devolved powers and decision-making related to environmental governance, as well as for wider policy and legislative issues. The draft bill includes proposals to replace Environmental Impact Assessments (EIA) and Strategic Environmental Assessments (SEA) with outcome-focused Environmental Outcome Reports (EOR).
13. The draft Bill states that: ‘regulations made by the Secretary of State under EOR regulations may specify outcomes relating to environmental protection in the United Kingdom or a relevant offshore area that are to be “specified environmental outcomes”’. The Bill proposes that the Secretary of State would be able to make EOR Regulations which contain provisions within Scottish Ministers’ devolved competence, after consultation with them. The draft bill also includes other powers which could have implications for Scotland, such as those related to planning data regulations.
14. Scotland refreshed EIA regulations in 2017 and currently applies SEA more broadly than the original requirements set out by the EU Directive. Any reduction in the requirements currently set out by SEA and EIA regulations could have negative implications for the environment and for the capacity for the public to be involved in environmental decision making. This may be of relevance to ESS’ future work as it assess the effectiveness of environmental legislation.

Review of Environmental Governance

15. The changes described above provide context to the ESS’ ongoing work. Section 41 of the Continuity Act 2021 requires Scottish Ministers to consult on the effectiveness of

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environmental governance arrangements, which includes the functions performed by ESS, within six months of the publication of ESS' approved strategic plan. The Act requires the Scottish Government to lay the results of that consultation, and Scottish Ministers' recommendations in response, in the Scottish Parliament. ESS looks forward to working with the Scottish Government on this review.

Yours sincerely

Mark Roberts
Chief Executive