



THE CASE FOR A SUBSTANTIVE RIGHT TO A HEALTHY ENVIRONMENT

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Introduction

This paper looks at ongoing key environmental challenges in Scotland under four topics: the climate crisis, the biodiversity crisis, pollution, and the lack of substantive review in judicial reviews. The purpose is to make the case for inclusion of a substantive human right to a healthy environment in law. We make the case that it can cement existing protections, further the development of new ones and help to redress the legacy of environmental burdens for a more just society. In all the areas examined, there is existing environmental legislation, yet there remain significant environmental problems. A codified substantive right could reprioritise the pursuit of environmental protection over unsustainable economic drivers.

Three caveats apply. **First**, the issues have been distilled and simplified. The focus is on highlighting shortcomings for the environment and therefore the nuances, dynamism and complexities around furthering environmental goals are not captured. This is not intended to downplay progress that has been made; rather, the intention is to show that a codified right could spur further progress, and promote the status and reach of environmental protections. **Second**, this is not a comprehensive audit of environmental issues in Scotland and is a work in progress. It is a sample of examples chosen to 'colour in' the case for a substantive human right to a healthy environment, and serves to complement RSPB's more in-depth case studies on the Menie Estate (Trump) golf course application and the Forth and Tay and Strathy South offshore wind farms. **Third**, this paper does not touch on the procedural aspects of the human right to a healthy environment aside from in relation to substantive review. This is because a substantive right would help give effect to the application of Article 9(2) Aarhus Convention. The procedural right to a healthy environment has yet to be properly implemented in Scotland on several counts, and the case for its proper implementation has been well made elsewhere.¹

¹ Other barriers include but are not limited to: costs, the lack of third party right of appeal, lack of proper public participation, unwillingness of litigators to take on environmental cases, and more. [Report on the Feasibility of an Environmental Rights Centre Scotland](#) (Scottish Environment LINK, 2018), pp 31-36 on barriers, and Appendix II for Access to environmental justice case studies; [Access to justice on the environment, and whether Scotland is providing it](#) (ERCS, July 2020)

Environmental challenges

1. Climate crisis

Context

The Scottish Government declared a climate emergency in April 2019,² following the Special Report (2018) by the Intergovernmental Panel on Climate Change in which it was argued that there were twelve years to avert a climate catastrophe.³ Whilst Scotland is a leader in a suite of renewables, it is still largely dependent on fossil fuels.⁴

The Climate Change (Emissions Reduction Targets) (Scotland) Act 2019, 'sets targets to reduce Scotland's emissions of all greenhouse gases to net-zero by 2045 at the latest, with interim targets for reductions of at least 56% by 2020, 75% by 2030, 90% by 2040.'⁵ These targets were increased at the eleventh hour, as a result of intense and lengthy campaigning by youth climate activists, Friends of the Earth Scotland and others.⁶ However, environmentalists had called for higher targets of 80% reductions by 2030, and net zero by 2040, in line with 'fair shares' methodology.⁷

While the devastating impacts of climate change across the globe are well understood,⁸ its impacts in Scotland are sometimes overlooked or underplayed. In Scotland, climate change is already resulting in more intense rainfall events, enhanced wave impacts and rising sea levels causing increased coastal erosion and landslides,⁹ most recently seen this August with the fatal Stonehaven train derailment.¹⁰ Average temperatures in Scotland have already increased by almost 1°C above pre-industrial levels, and this is also having detrimental impacts on nature.¹¹

Justice intersection

Climate change will have its worst impacts on poorer countries, indigenous peoples and migrants globally; and areas of highest deprivation, children, persons with disabilities and people in already vulnerable situations in Scotland.

The need for a substantive right to a healthy environment

A substantive right could strengthen the case for increased climate change targets and more ambitious policies for climate justice.

² [Nicola Sturgeon declares 'climate emergency' at SNP conference](#) (BBC News Online, 29 April 2019)

³ [Global Warming of 1.5°C](#) (IPCC, 2018)

⁴ [Analysis: Scotland still relies on fossil fuels](#) (Holyrood Magazine, 5 December 2018)

⁵ [Climate Change](#) (Scottish Government Website)

⁶ [People Power delivers increased action in the Climate Bill](#) (Friends of the Earth Scotland blog, 25 Sept 2019); [Is Scotland leading the way on climate change?](#) (BBC News Online, 4 February 2020)

⁷ [Climate Fair Shares](#) (Friends of the Earth International website)

⁸ See footnote 3, and frequent news reports e.g. [Melting Antarctic ice will raise sea level by 2.5 metres – even if Paris climate goals are met, study finds](#) (The Guardian, 23 September 2020)

⁹ [Climate change: the 'devastating' risks facing Scotland](#) (The Ferret, 28 August 2017)

¹⁰ [Stonehaven derailment: Report says climate change impact on railways 'accelerating'](#) (BBC News Online, 10 September 2020)

¹¹ [State of Nature](#) (Scottish Environment LINK, 2019)

2. Biodiversity crisis

Context

Scottish Environment LINK (2019) state 'since recording began, 49% of Scottish species have decreased, 28% have increased. Nature is changing rapidly, with 62% of species showing strong changes. Of the 6,413 species found in Scotland, that have been assessed, 11% have been classified as threatened with extinction from Scotland.'¹²

In response to this biodiversity crisis, at the Edinburgh Declaration (2020), subnational governments in Scotland declared they were, 'deeply concerned about the significant implications that the loss of biodiversity and climate change has on our livelihood and communities.'¹³ Notwithstanding the recognised need to protect and increase Scotland's biodiversity, and existing legal protections (including the Wild Birds Directive and the Habitats Directive), petitioners who have invoked biodiversity and ecosystems protection in legal challenges have lost. This is examined in section 4 below.

Justice intersection

The lack of balance in ecosystems impacts on nature's intrinsic rights.

It also impacts on health and wellbeing.¹⁴ Covid-19, in particular, has shown how human rights and environmental protection are inextricably linked.¹⁵

In addition, children are particularly impacted from ecosystems imbalance. The UN Special Rapporteur on Human Rights and the Environment (2018) notes, 'No group is more vulnerable to environmental harm than children... climate change and the loss of biodiversity threaten to cause long-term effects that will blight children's lives for years to come. Making matters worse, children are often not able to exercise their rights, including their rights to information, participation and access to effective remedies.'¹⁶

The need for a substantive right to a healthy environment

A substantive right would strengthen the case to rebalance and restore ecosystems across all areas of policy, including budgetary decisions and planning policies.

It would allow for relevant environmental laws to be considered and applied as part of substantive review in legal cases (discussed below).

¹² Ibid.

¹³ [Edinburgh Declaration for subnational governments, cities and local authorities on the post-2020 global biodiversity framework](#) (2020)

¹⁴ [Healthy Environment, Healthy Lives: How the environment influences health and well-being in Europe](#) (European Environment Agency Report, September 2020)

¹⁵ [COVID-19, Environmental Protection & Human Rights Leadership](#) (Morgera and Miller, University of Strathclyde blog, 28 May 2020)

¹⁶ [Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment \(A/HRC/37/58\)](#) (United Nations Human Rights Council, 2018), p 18

3. Pollution

Environmental pollution is defined by the Environmental Protection Act 1990 as the ‘release (into any environmental medium) from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment.’¹⁷ It takes many forms in Scotland including air pollution from traffic and water pollution,¹⁸ the presence of toxic waste at landfill sites,¹⁹ and noise pollution.²⁰ We offer two examples: pollution from traffic, and from industrial activity at the Mossmorran plant in Fife.

i. Air pollution from Traffic

Context

Scotland is in breach of Scottish statutory air quality standards for NO₂ and PM₁₀ in thirty eight locations (designated as Air Quality Management Areas) in towns and cities across Scotland.²¹ It is also in breach of European air quality legislation in relation to NO₂.²² The main contributor towards these breaches is road transport emissions.²³ The Scottish statutory standards are based on WHO guidance and were meant to be met in 2005 for NO₂ and 2010 for PM₁₀.²⁴ Air pollution is linked with reduced life expectancies, cancers, heart disease, babies being born prematurely and/or with low birthweights, and stunted development in children.²⁵

Justice intersection

There is a comorbidity with existing health conditions including smoking and heart disease, which are higher in areas of multiple deprivation.²⁶ Children are disproportionately impacted by air pollution.²⁷

The need for a substantive right to a healthy environment

A substantive right could yield faster action to achieve statutory air quality standards.

It could bring about stricter duties on both Scottish Government and local authorities.²⁸

‘Cleaner Air for Scotland Strategy – An Independent Review’ (2019) found ‘There is... clearly much more to do to achieve the desired outcomes across Scotland that ensure public health is

¹⁷ [Environmental Protection Act 1990](#), s 1(1)

¹⁸ E.g. following heavy rainfall and flooding in August 2020, sewers overflowed in many parts of Scotland, contaminating water: [These 30 Scottish beaches are all breaking sewage safety limits](#) (The National, 23 August 2020)

¹⁹ E.g. [Report on the Feasibility of an Environmental Rights Centre Scotland](#) (Scottish Environment LINK, 2018), Case study ‘Greengairs, North Lanarkshire – landfill, opencast coal mine and waste incinerator’ in Appendix II

²⁰ E.g. new flight paths over Edinburgh have resulted in noise pollution for local residents: [Revealed: the 16,000 hidden victims of Edinburgh Airport noise](#) (The Ferret, 24 June 2020)

²¹ [Air Pollution](#) (Friends of the Earth Scotland website)

²² [Directive 2008/50/EC](#) (Air Quality Directive); [Revealed: Scotland’s most polluted streets in 2019](#) (Friends of the Earth Scotland Press Release, 19 January 2020)

²³ It is worth noting that shipping and aircraft emissions are also relevant. Air pollution also contains agricultural and domestic combustion impacts as well as various particulate and mobile chemical materials from microplastics, abrasion processes, coatings and treatments and regulated and unregulated industrial activity.

²⁴ [Standards](#) (Air Quality in Scotland Website)

²⁵ [Every breath we take: the lifelong impact of air pollution](#) (Royal College of Physicians Report, 2016)

²⁶ [Health Impacts of Air Pollution](#) (European Environment Agency, 2020), p 6

²⁷ See footnotes 16 and 23

²⁸ under current legislation, local authorities have to prepare Air Quality Action Plans but there is no explicit requirement for those plans to achieve compliance with the Standards: [Environment Act 1995](#), Part IV, s 84

comprehensively protected and a suitably integrated approach to transport, environment, planning and health is taken. This approach is essential for the health and wellbeing of society, its mobility for economic and social needs as well as for the delivery of the high standards of quality of life that we all expect.²⁹

If the right to a healthy environment is underpinned by environmental principles, then the principle of integration can ensure such an approach, for example, by shaping budgetary spend on low-carbon transport, as well as planning policy to prevent further deterioration of air quality, and transport policy away from promoting private car usage and towards supporting low-carbon transport infrastructure.

ii. Industrial pollution from flaring at the Mossmorran Plant

Context

There is frequent planned and emergency gas flaring at the Mossmorran Natural Gas Liquids Plant, operated by Shell and ExxonMobil, near Cowdenbeath, Fife.³⁰ Nearby residents have raised concerns over this flaring, in particular unplanned emergency flaring in recent years. As recently as 5th October, hundreds of complaints were issued to SEPA about a faulty compressor which resulted in unplanned flaring.³¹ SEPA issued a warning to site operators in 2018 and reported, in May 2020, that it intends to submit a report to the Crown Office and Procurator Fiscal Service for consideration of prosecution for breaches of the operator's permit.³²

The 'Mossmorran Action Group' was set up by residents in the late 2010s. Long-term social, health and environmental impacts have been documented: including headaches, sleep disturbances, breathing problems, light pollution, and vibrations in people's homes.³³ More propane was emitted to the environment than reported in 2013-15, resulting in fines.³⁴

Justice intersection

Cowdenbeath, the locality experiencing the largest share of impacts from Mossmorran, is ranked in the most deprived quintile by the Scottish Index of Multiple Deprivation.³⁵

The need for a substantive right to a healthy environment

A substantive right may yield faster action to protect the local population and environment.³⁶

²⁹ [Cleaner Air for Scotland Strategy – An Independent Review: Final report to the Scottish Government](#) (Professor Campbell Gemmill, 2019), p 67

³⁰ Other examples include plans for new incinerators in Scotland (see e.g. [Rash of new waste incinerators prompts fears for health and recycling](#) (The Ferret, 23 October 2017)), and flaring at the Grangemouth petrochemicals site.

³¹ [In Pictures: Mossmorran chemical plant flaring seen across Fife, Edinburgh and Lothians and sparks hundreds of complaints](#), (Edinburgh Evening News, 6 October 2020)

³² [Mossmorran: Sepa seeks prosecution over chemical plant flaring](#) (News Online, 14 May 2020); [Mossmorran and Braefoot Bay complexes Updates](#) (SEPA Website)

³³ See [Mossmorran Action Group](#) (Resident-led action group Website)

³⁴ [Shell fined £40,000 for breaching climate pollution rules at Fife plant](#) (The Ferret, 16 July 2018)

³⁵ [Scottish Index of Multiple Deprivation](#) (Website)

³⁶ [Mossmorran flaring shows the need for an environmental court](#) (Opinion Piece by Dr Dixon, Friends of the Earth Scotland, in the Scotsman, 18 May 2020)

4. Lack of substantive review in environmental cases and strict test for procedural review

Context

In Judicial Reviews, the procedure by which a public authority's decision was taken is examined; there is no formal route for the full substance of the decision to be scrutinised. Additionally, the procedural test in most cases, including in environmental cases, is the strict *Wednesbury* standard.³⁷ This test to determine whether a decision of a public authority should be quashed was applied in Scotland in the *Wordie* case and is if that decision, '... is based upon a material error of law going to the root of the question for determination ... if the [public authority has] taken into account irrelevant considerations or ... failed to take account of relevant and material considerations ... [W]here it is one for which a factual basis is required, there is no proper basis in fact to support it ... [or] if it ... is so unreasonable that no reasonable [authority] could have reached... it.'³⁸ This test is stricter than the 'anxious scrutiny' procedural standard which is applied in human rights cases, or the proportionality test used by the Court of Justice of the European Union.³⁹

Wednesbury unreasonableness, and the lack of full substantive review, are in breach of Article 9 (2) Aarhus Convention. Along with other problems with Scotland's implementation of Aarhus, outside the scope of this paper,⁴⁰ the environment remains improperly protected in law. The Aarhus Convention Compliance Committee (2010) found the following in respect of the United Kingdom, which has relevance for Scotland: '[we are] not convinced that the Party concerned, despite [certain] challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords, and the European Court of Human Rights, of the very high threshold for review imposed by the *Wednesbury* test.'⁴¹ Environmental NGOs and lawyers raised a communication with the Committee on this topic in 2015.⁴²

Table 1 presents a selection of prominent Judicial Reviews on environmental matters taken in Scotland over the past twenty years. It highlights that, in the cases which made it all the way to review, the reviews undertaken were mainly procedural and undertaken according to the strict *Wednesbury* standard. In most cases the petitioners ultimately lost, notwithstanding important environmental themes and legal protections invoked.

³⁷ For more analysis, see [Communication to Aarhus Compliance Committee ACCC/C/2017/156](#) (RSPB, Friends of the Earth England, Wales, and Northern Ireland, Friends of the Earth Scotland, and Leigh Day, 2015), esp pp 7-10

³⁸ *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at 347-348 (emphasis added)

³⁹ For more information on anxious scrutiny, see [Annex A to Communication to the Aarhus Convention Compliance Committee](#) (RSPB, Friends of the Earth England, Wales, and Northern Ireland, Friends of the Earth Scotland, and Leigh Day, 2015)

⁴⁰ See footnote 1

⁴¹ [Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of GB & NI](#) (UNECE Meeting of the Parties to the Aarhus Convention, Report of the Compliance Committee, 2010), paragraph 125 (emphasis added)

⁴² [Communication ACCC/C/2017/156](#) (RSPB, Friends of the Earth England, Wales, and Northern Ireland, Friends of the Earth Scotland, and Leigh Day, 2015)

Table 1: Prominent Judicial Reviews taken on environmental matters in Scotland over the past 20 years

Case	Substantive issues	Outcome
Cairngorms Funicular ⁴³	In the late 1990s, WWF and the RSPB challenged the Scottish Government's failure to include an area within a proposed Special Protection Area ('SPA') and Special Area of Conservation ('SAC'), that was subsequently proposed for the development of the Cairngorm funicular. WWF & RSPB were concerned the funicular would threaten rare protected birds and invoked provisions under the Wild Birds and Habitats Directives.	The judge held against WWF and RSPB. In reviewing the case, the judge applied the <i>Wednesbury</i> procedural standard. He said: 'At the outset, I must emphasise that I am not concerned with the merits of any of these decisions.' The funicular was built but is currently not in operation. It remains controversial for many reasons concerns including but not limited to its environmental impacts. ⁴⁴
Skye wind farm at Edinbane ⁴⁵	The Skye Windfarm Action Group (SWAG) challenged Highland Council's decision to grant planning permission for an 18-turbine development at Edinbane. Petitioners contended, among other things, that Highland Council did not undertake an appropriate assessment (pursuant to the Wild Birds Directive) of the impacts of the farm on golden eagles present in the Cuillin mountain range which lies 15km south of the site and is a designated SPA.	The court dismissed the claim. The wind farm is now operational, with no reported impacts on golden eagles, although they remain rare and their population in slow decline, reportedly due to nest disturbances. ⁴⁶
Hunterston coal fired power station ⁴⁷	Marco McGinty, a bird watcher from Largs, lodged a Judicial Review ('JR') in September 2009 against the Scottish Government over its inclusion of a new coal fired power station at Hunterston in the second National Planning Framework. The proposed power station was one of the most unpopular in Scottish history. There were concerns over the prospect of new coal being burned in spite of the climate crisis and Scotland's abundant renewable potential, impacts on birds and biodiversity at the site (a protected Site of Special Scientific Interest ('SSSI'), as designated under	McGinty won Scotland's first Protective Expense Order, but ultimately lost the case. Plans for the power station were eventually abandoned in 2012, with the developer citing financial concerns. ⁴⁹ This was fortuitous for the environment and is a testament to the efforts of campaigners.

⁴³ *R v Secretary of State for Scotland & Others, ex parte WWF & the RSPB (1998) OH*

⁴⁴ [Voluntary groups call for dismantling of Cairn Gorm funicular railway](#) (Group.co.uk, 21 November 2019); [Cairngorm funicular repairs will not be done in time for this year's skiing season](#) (The Press and Journal, 18 June 2020)

⁴⁵ *Skye Windfarm Action Group v Highland Council [2008] CSOH 19*

⁴⁶ [Skye Birds](#) (website)

⁴⁷ *Marco McGinty v The Scottish Ministers, [2011] CSOH 163, [2013] CSIH 78*

⁴⁹ [Hunterston power station plans withdrawn by Ayrshire Power](#) (BBC News Online, 26 June 2012)

	the Nature Conservation (Scotland) Act 2004), and human rights concerns over the sourcing and mining of the coal. ⁴⁸	
Trump golf course ⁵⁰	In 2009, octogenarian Molly Forbes attempted to lodge a JR of a planning decision to approve Donald Trump's £750m golf course and leisure development along the coast to the north of Aberdeen. Environmental concerns included the impact of the development on the Foveran links SSSI on the Menie Estate.	Forbes had to abandon the case due to the procedural barriers examined in detail elsewhere. ⁵¹ The golf course was built. In 2019 NatureScot (then SNH) proposed the partial denotification of the Foveran Links SSSI, citing loss of habitat and destruction of the area due to the golf course. ⁵²
Aberdeen bypass ⁵³	In the early 2010s, campaign group Road Sense and its chair William Walton challenged the Scottish Government's decision to give permission to construct a bypass in Aberdeen. The bypass attracted thousands of objections. Many felt that the impacts of the bypass on traffic reduction had been overstated, ⁵⁴ and were concerned that the bypass would damage the River Dee catchment SAC. The bypass required a bridge crossing over the River Dee, one of the best areas in the United Kingdom for Atlantic salmon, freshwater pearl mussels and otters.	Walton ultimately lost the case. The bypass was opened in 2019. ⁵⁵ Traffic remains a problem for Aberdeen: it still has three designated Air Quality Management Areas where Scottish statutory standards continue to be breached. ⁵⁶
Cairngorms Local Plan ⁵⁷	The Cairngorms Campaign challenged via JR the Cairngorms National Park Authority's decision to adopt a Local Plan, which included provision for numerous dwellings. They were concerned that an appropriate assessment of the impact of these proposed new settlements on the Spey Special Area of Conservation and other European Sites in the area had not been adequately undertaken, which ran counter to Articles 6(3) and (4) of the Habitats Directive.	The appellants lost the case. Applying <i>Wednesbury</i> , the court held 'we are not persuaded that the [Cairngorms National Park Authority's] appropriate assessment was one which no reasonable authority... would have produced.' ⁵⁸

⁴⁸ For more information on environmental and justice concerns, see [Say NO to dirty coal at Hunterston](#) (eNGO briefing, 2010)

⁵⁰ *Forbes v Trump & Aberdeenshire Council* [2010] CSOH 01, [2010] CSOH 142

⁵¹ [Complying with the Aarhus Convention on Access to Environmental Justice: Tipping the scales](#) (Friends of the Earth Scotland Report, 2011), p 31

⁵² [Reasons for the proposed partial denotification of Foveran Links SSSI](#) (NatureScot briefing, June 2019)

⁵³ *William Walton v Scottish Ministers* [2011] CSOH 10, [2011] CSOH 131, [2012] CSIH 19, [2012] UKSC 44

⁵⁴ [Fighting on](#) (Holyrood Magazine, 19 November 2012)

⁵⁵ [Aberdeen bypass: The long and winding road](#) (BBC News Online, 19 February 2019)

⁵⁶ [Air Quality Management Areas, Aberdeen City Council](#) (Air Quality in Scotland Website)

⁵⁷ *Cairngorms Campaign v National Park Authority* [2012] CSOH 153, [2013] CSIH 65A

⁵⁸ [2013] CSIH 65A, Paragraph 63

Stronelaig wind farm ⁵⁹	In 2014, the Scottish Government approved the construction of a 67 wind turbine development at Stronelaig. The John Muir Trust was concerned about the impact of the development on wild land, tourism and peatland. It lodged a JR against the Scottish Government.	The John Muir Trust won the case at the Court of Session Outer House, invoking procedural grounds, but the decision was overturned on appeal by the Inner House. The John Muir Trust ended their legal action, and at all stages, their application for a Protective Expense Order was refused.
Viking Energy wind farm ⁶⁰	Sustainable Shetland took a JR of the Scottish Government’s decision to grant planning permission for a 103 turbine wind farm development across 50 square miles on mainland Shetland. Sustainable Shetland was concerned about the potential impacts of the project on the whimbrel, a rare wading bird which nests nearly exclusively on Shetland. One of the grounds of Sustainable Shetland’s Review was that Ministers had failed properly to consider and execute their duties under the Wild Birds Directive in respect of the whimbrel.	The Lord Ordinary found in favour of Sustainable Shetland, finding that the Scottish Ministers had not properly applied the Wild Birds Directive to their decision. But the Inner House allowed the Ministers’ appeal. The court chastised the Lord Ordinary’s approach and reaffirmed the <i>Wordie</i> test (the Scots law application of <i>Wednesbury</i>): ‘Because it may have been lost sight of, we remind ourselves of the nature of judicial review in a case of this sort.’ ⁶¹ The case went all the way to the Supreme Court, which agreed with the Inner House. ⁶² Work recently began on construction of the turbines. ⁶³
Forth and Tay wind farms ⁶⁴	The RSPB took a JR of the Scottish Government’s decision to grant permission for four commercial offshore wind farms in the Firths of Forth and Tay. They foresaw that the consents represented a risk to thousands of Scotland’s seabirds: ‘The assessments estimated over a thousand gannets and hundreds of kittiwake, could be killed each year during the summer months alone and many hundreds of puffin could die as a result of losing important feeding areas. Countless other birds also pass through the area on migration, and these developments will undoubtedly impact them.’ ⁶⁵ They invoked provisions within EIA, Birds and Habitats Directives.	The grounds of review covered largely procedural grounds, and the Inner Court held against the RSPB, reaffirming the <i>Wednesbury</i> review standard. In 2017, Forth and Tay developers progressed ‘new design’ applications to replace their existing 2014 consents. In June 2020, Scottish Ministers varied the existing consent to increase top power at the farm from 700MW to 1GW. ⁶⁶

⁵⁹ *John Muir Trust v Scottish Ministers & SSE* [2014] CSOH 172A, [2015] CSOH 163, [2016] CSIH 61

⁶⁰ *Sustainable Shetland v Scottish Ministers & Viking Energy* [2014] CSIH 60, [2015] UKSC 4

⁶¹ [2014] CSIH 60, para 23

⁶² [2015] UKSC 4 at paras [29]-[30] per Lord Carnwath

⁶³ *Work begins on Viking Energy windfarm on Shetland*, (The Herald, 13 September 2020)

⁶⁴ *RSPB v Scottish Government* [2016] CSOH 106, [2016] CSOH 103, [2017] CSIH 31

⁶⁵ *Forth and Tay Wind Farms* (RSPB Website)

⁶⁶ *Red Rock secures blessing for 1GW Inch Cape* (Renews.biz, 28 July 2020)

Tullymurdoch wind farm ⁶⁷	Local shepherd Helen Douglas challenged Perth and Kinross Council's decision to grant planning permission for a windfarm. She was concerned about the impact of the development on ospreys and wildcats and invoked the Wild Birds and Habitats Directives.	The Court reaffirmed the <i>Wednesbury</i> approach and held against Douglas, and the wind farm was under construction as of 2018. ⁶⁸
Cockburnspath wind farm ⁶⁹	Sally Carroll challenged the decision of a Local Review Body to allow the Scottish Borders Council's decision to grant planning permission for two wind turbines. Carroll was concerned about the siting of the wind turbines, which was within two kilometres of the Berwickshire Coast Special Landscape Area, four kilometres of the Lammermuir Hills Special Landscape Area, one kilometre of the Dunglass historic garden, two kilometres of the Southern Upland Way, and close to the two conservation areas of Oldhamstocks and Cockburnspath and the Berwickshire Coastal Path.	The Court reaffirmed the <i>Wednesbury</i> reproach and its own sovereignty in relation to the Aarhus Committee's consideration that <i>Wednesbury</i> may not meet the standards for review required by the Aarhus Convention as regards substantive legality. ⁷⁰ 'Whilst of course the concerns of the Aarhus Convention Compliance Committee are entitled to respect, the convention is not part of domestic law as such (except where incorporated through European directives).'

⁶⁷ *Douglas v Perth and Kinross Council* [2017] CSIH 28

⁶⁸ [Key milestone achieved at Tullymurdoch wind farm](#) (Bdaily News, 25 February 2018)

⁶⁹ *Carroll v Scottish Borders Council* [2015] CSIH 73

⁷⁰ Cited above, footnote 38

Justice intersection

Environmental damage has a disproportionate impact on individuals and communities already experiencing health inequality and systemic injustice.

There have been relatively few environmental Judicial Reviews taken in Scotland and they tend to be on similar themes. This is largely because the lack of substantive review and focus on process, compounded by the risk of costs, makes the eNGO sector cautious about taking environmental Judicial Reviews. Moreover, disadvantaged communities often do not have the capacity to pursue action to protect their own health and the environment. Burnout often is cited as a consequence of, or deterrent of Judicial Reviews leading to a phenomenon called ‘the chilling effect’.⁷¹

As a result, the Judicial Reviews that have made it to court do not reflect the full scale of environmental injustices in Scotland.

The need for a substantive right to a healthy environment

A substantive right could serve to strengthen compliance with the right to review under Aarhus (Article 9(2)).

Conclusion

We have made the case that a substantive human right to a healthy environment would strengthen and would underpin environmental protection, restoration, and remediation both in policy and law.

At a policy level, we have argued that environmental damage continues in Scotland at a time where protection, restoration and remediation are more important than ever. Moreover, environmental damage has a disproportionate impact on individuals and communities already experiencing health, economic and social inequality.

With regards to the courts, we have shown that the Court of Session is limited to a conservative application of Judicial Review. In spite of the concerns raised by the Compliance Committee to the Aarhus Convention it has still consistently applied a tight and narrow procedural standard of review. This makes it clear that legislative reform is required. The narrow approach taken by the courts influences the number and type of Judicial Reviews pursued. Where positive outcomes for the environment have occurred after legal challenges, these are often down to good fortune or hard-fought campaigning battles. Scotland’s statutory human rights framework should be able to protect the environment and the human right to a healthy environment. This

⁷¹ For example, following an unsuccessful Public Local Inquiry against a Biomass power station at Grangemouth in 2012, opposed to on the grounds of its impacts on climate change and global deforestation (deemed to be outside the scope of the inquiry), Grangemouth Community Council disbanded. [Friends of Loch Etive](#), who opposed a fish farm, state on their website, ‘Repeated applications can drain our energy and wear us down’

right would serve as a foundation for a progressive environmental framework for Scotland in the 2020s.