

Consultation link: <https://consult.gov.scot/environmental-standards-scotland/draft-strategic-plan/>

Draft strategy link:

<https://environmentalstandards.scot/wp-content/uploads/2022/05/ESS-Strategic-Plan-for-consultation-20220524-vA56578875.pdf>

1. Do you have any comments on our Vision and Mission Statement, set out in chapter 3?
Our vision is that:

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.

Our mission statement is that:

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.

ERCS supports the vision and mission statement in principle. However, we would suggest omitting 'communities' to the vision statement to encompass protection of both Scotland's people and the environment: *'Scotland benefits from a high-quality environment which is protected from harm...'*

The mission statement would benefit from indicating how you will ensure more accessible, timely and effective routes for people to raise concerns about regulatory enforcement gaps or omissions in order to achieve your vision. We would suggest adding the following (or similar) to the mission statement:

'...and that everyone has accessible, timely and effective routes to hold public authorities to account and have their environmental rights upheld'.

2. Do you have any comments on our Strategic Outcomes, set out in chapter 3?

Our strategic outcomes 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

ERCS supports the strategic outcomes. However, the fourth objective could give more emphasis to increasing public awareness as a specific outcome (rather than only 'engaging

and communicating’): *‘People are more aware of environmental law and how to enforce their rights through the work of ESS’.*

3. Do you have any comments on our Values and Principles, set out in chapter 3?
Our Values

Others View us as

Our Staff feel

Independent

Respected

Transparent

Included

Trusted

Innovative

Effective

Collaborative

Our Principles

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

We would suggest directly referring to all five Environmental Principles - the precautionary principle, the integration principle, the preventative principle, the principle that damage should be rectified at source, and the polluter pays principle - and how this underpins your operating Principles above. More explicit recognition of holding duty bearers to account is needed, emphasising your commitment to addressing the power imbalances in environmental disputes to ensure the effective implementation of environmental law.

4. Do you have any comments on our proposed approach to resolving matters informally with public authorities, set out in chapter 4?

We broadly support the outlined approach to resolving matters informally. However, with reference to the organisation's stated principle of being "open and transparent", we note that while the strategy states that the organisation will publish issues subject to live investigations and pre-investigation casework, it is not clear what information will be publicly available in relation to informal resolutions. In contrast it is explicitly stated that compliance notices will be reported publicly. Greater openness and transparency will enable us to learn from investigations, and support ESS in identifying patterns of infringement and preventing future breaches.

While it may not be appropriate to publish details of all cases resolved informally, we believe there should be a presumption of transparency. To that end, the strategy should make clear how it will report informal resolutions and in what circumstances information on these will be published or withheld.

We also propose amending the text to specify that efforts will be taken to 'consult/gather evidence from all relevant parties and stakeholders.'

5. Do you have any comments on our proposed approach to determining what constitutes a systemic failure, set out in chapter 4?

You define systemic failure as 'an identified problem which goes beyond the actions of a single public authority, and reflects a pattern of conduct across multiple public authorities pointing towards a structural flaw in the system'.

We agree with this definition and the action to issue an improvement report over a compliance notice in these circumstances. We strongly believe that persistent lack of enforcement of regulations must be addressed forcefully.

However, identifying an issue as a systemic failure puts the burden on the person/group making the representation to gather the evidence often beyond the scope of their own environmental issue. This is a barrier to accessing ESS. It would be helpful to open the criteria to accept representations from groups who have good cause to expect their local issue reflects a systemic problem, and something which ESS could investigate further.

6. 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?

It may be helpful to clarify whether a compliance notice is about a systemic failure within a single public authority, whereas an improvement notice is for more than one public authority. More details could be added under para 4.12 regarding the circumstances under which ESS goes to court.

7. Do you have any comments on our proposed approach to determining whether a compliance failure or environmental harm is serious, set out in chapter 4?

ERCS disagrees with the way that reversibility is presented here as an option. If harm is caused, this should be fully recognised and acted upon. The fact that it could more easily be rectified than another type of harm should not be given the same weighting as the size, scale and significance of the harm done.

8. Do you have any comments on our proposed approach to deciding whether, and how to prioritise and carry out our investigations, set out in chapter 5?

It may be helpful to add under 'neglect' something which acknowledges the impact of the environmental issue on the local community and the procedural barriers they have faced in navigating the system to seek redress thus far, e.g. in relation to how people and place influences whether or how complaints are brought forwarded.

This could include scrutiny of public bodies tasked with addressing environmental harms, in terms of analysing how capacity and resources are allocated. It could also take into account communities' historical experiences of injustice and deprivation, examining the ways in which socio-economic inequalities influence citizen voice and power.

We also recommend adding in a call for evidence where members of the public can make submissions, and also open an alternative channel for citizens to log concerns. This can help to identify issues of concern for further investigations and address current hurdles to citizens seeking to make representations.

9. Do you have any comments on our proposals for monitoring compliance and effectiveness, and taking account of different types of information, as set out in chapter 6?

Investigations could be supported by data from citizen science initiatives, and ESS could consider supporting participatory environmental monitoring to this end.

10. Do you have any comments on our draft priority topics for further analysis? Do you have any suggestions for key sources of data and intelligence that we should consider, as set out in chapter 6?

We would welcome views on our proposed set of initial analytical priorities and suggestions of any key sources of data or intelligence that we should be considering. We will be undertaking further work during the consultation period to verify and quality assure our work and will discuss our baseline summaries of the evidence with key data and knowledge partners.

Regarding section 6.13 - the remit of ESS should be to act as an enforcement body as well as a monitoring body. To further this aim, ESS needs to focus on *scrutiny* (currently absent

from this section), e.g. for waste and recycling, *'to scrutinise compliance with targets and identify areas of non-compliance' rather than 'measure progress'*.

The purpose of ESS is to ensure the correct application and enforcement of environmental laws and regulations. To this end, we would like to see more details identifying pollutants to be investigated, e.g. the impacts of pesticides on soil health, the impacts of microplastic and sewage discharge on water quality, the impact of petrochemicals on human health and air quality.

Regarding cross-cutting environmental governance, ERCS suggest changing text to *'improving access to justice on the environment and full compliance with the Aarhus Convention'* and incorporating *'maintain oversight on the development of environmental governance on reserved matters and cross-border issues,'* (e.g. the forthcoming Levelling up and Regeneration Bill, and the Natural Environment (Scotland) Bill).

11. 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?

We agree with your approach.

12. Do you have any comments on our proposed approach to receiving and handling representations, set out in chapter 7?

The limitation of ESS powers in not considering complaints about public authorities or act as an appeal body does impede access to procedural justice on the environment. ERCS strongly supports the extension of ESS powers to at least acknowledge and monitor individual cases of environmental harm to begin to build an evidence base of what might be systemic problems. ERCS would be keen to support this process by highlighting potential issues and responding to a 'Call for Evidence'. We also recommend offering an additional, alternative channel for citizens to log concerns or grievances concerning environmental harm, and maintain a log of problems identified.

It would be helpful to include timescales for responding to enquiries and standards for regular communication. This would be an effective way of building trust in your processes and demonstrate transparency. We appreciate investigations may take time, but regular updates are important to demonstrate complaints are being dealt with.

It is important to show how engagement processes will be legible and comprehensive for marginalised groups, including neurodiverse people, disabled people, and non-native English speakers. We suggest adding the representation form into the Annex to illustrate accessibility options.

13. Do you have any comments on how we maintain our ambition to be a high performing organisation, as set out in chapter 8?

We appreciate that ESS is in its infancy, and we stress the importance of maintaining a focus on frontline investigations and creating robust systems for data monitoring to uphold strong environmental governance.

14. Do you have any comments on our proposed approach to measuring our impact, as set out in chapter 9?

Our expectation is that ESS will use a number of different approaches to ensure that:

1. Environmental laws and standards are upheld
2. Gaps are identified to improve environmental laws and standards
3. Communities report satisfaction in both ESS's response and outcomes.
4. ESS can demonstrate that they have prioritised the places and people disproportionately impacted by environmental harm, and improved environmental quality.

15. Do you have any comments on our proposed key performance indicators, as set out in Annex B?

See answer to question 14.

16. Are there any other factors that you think we should consider before exercising our functions?

Our plan has set out how we intend to go about our functions, including for example the factors we will take into account before we investigate or take informal enforcement action.

Barriers to justice that may deter citizens or eNGOs from submitting complaints on environmental matters. Please consult our answer to questions 8 and 17 for further details.

17. Do you have any other comments on our draft Strategic Plan and our proposed approach to fulfilling our remit?

ERCS welcomes the interventions ESS can make to advancing the human right to a healthy environment. It may be helpful to more concretely refer to the six features of the substantive element and your role in achieving them: clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, healthy biodiversity and ecosystems.

Equally referring to the procedural element, it would be helpful to locate your role in ensuring compliance with the Aarhus Convention and measures to improve access to justice on the environment.

In order to embed a human rights-based approach to environmental governance, it is essential that we recognise and address the particular institutional, social and cultural barriers experienced by marginalised groups. It would be helpful for ESS to articulate the assertive measures you will take to reduce these barriers in relation to accessing your

services and how you prioritise your work and interventions to advance environmental justice.

18. Do you have any comments on the interim conclusions of our impact assessments, as set out in Annex A?

ERCS would stress the need to respond to the disproportionate impact of environmental harm in areas of highest deprivation and the intersection of this with equality groups. This must inform how you prioritise your work and interventions.

In the first year of our free legal advice service, we are acutely aware of the length of time it takes to investigate the causes and consequences of environmental harm, and the limited capacity and resources of groups raising the concern to pursue their complaint. Often groups have struggled to navigate through the complaints systems of public authorities and have had multiple barriers to tackle with no redress. There is therefore an inevitable delay in accessing ESS and holding public authorities to account. The ability to respond, monitor and address these overarching and systemic issues should be a core function for ESS.

There is a fundamental gap in monitoring existing regulations and a consequent enforcement gap which must be addressed. There remains ambiguity as to whether ESS will respond to a one-off compliance issue and how much evidence and background work is required before a representation can be made. This is, in itself, a barrier to making representations and supporting groups to persist with their complaints.

19. Are there any sources of information that you can suggest we use to assess the potential impact of our Plan?⁴

No further comments.