

13th October 2023



**Net Zero, Energy and Transport
Committee**

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Dear Edward

Guiding Principles on the Environment and Environmental Governance

Thank you for your letter of 20th September 2023 requesting our views on the Guiding Principles on the Environment and Environmental Governance. I am pleased to submit this response on behalf of Scottish Water.

Guiding Principles on the Environment

1. *Are you satisfied that the guidance will help the Scottish Government and other public bodies make sound decisions in relation to any matter under consideration that has environmental consequences?*

The Statutory Guidance on the application of the five principles should assist Scottish Water and others in applying these principles to the relevant decision-making processes. The Guidance is clear on the circumstances in which public authorities whose activities comprise devolved matters are to have due regard for the guiding principles on the environment.

However, the guidance is fairly brief, with few indicative examples of how the principles are to be applied in practice. The duty will undoubtedly be subject to interpretation at least initially while a consistent approach evolves. We believe clear and consistent application of the guidance is key to avoid any potential challenge arising from erroneously applying the principles and to facilitate joined-up working between public bodies when seeking to achieve common objectives (for example when local authorities and Scottish Water seek to work together to manage rainwater sustainably within an urban catchment)

Further examples in the Guidance would help to illustrate the appropriate intended application of the principles. There should also be a commitment to update the Guidance regularly, to incorporate real-life case studies where principles have appropriately informed decisions and which illustrate how having “due regard” can be effectively interpreted. This would allow for revisions of the Guidance to reflect the experience of its application.

2. *Looking at the wording of the guidance, can you envisage scenarios in which it could make a difference; for instance, where it would lead the Scottish Government or a public body to adopt a changed approach on a particular matter?*

It is difficult to provide specific examples as approaches to address particular matters are often developed in the context of multiple principles, for example, financial sustainability, environmental sustainability and circular economy principles.

We can envisage that the application of the precautionary principle would enable planning authorities to apply a greater focus on climate change risks and adaptation in local development plans.

In addition, the principle that environmental damage should, as a priority, be rectified at source is one that we support. If this is applied in the water sector it enables upstream, rather than “end of pipe” solutions to be developed. This could better enable more sustainable interventions such as reducing the use of harmful products and chemicals, including those that have the potential to find their way into the sewerage system or landfill. Measures that Scottish Ministers / the Scottish Government might wish to take in this regard will be limited if acting independently from the rest of the UK (where the UK Internal Markets Act applies or regarding the functions of UK-wide regulatory bodies).

3. *Will the guidance ensure the Scottish Government and public bodies are required to adhere to the environmental principles to the same extent that governments and public bodies in the EU are required to adhere to the EU’s environmental principles?*

We are not in a position to comment on the extent to which public bodies in the EU are required to adhere to these principles. However, we note that the Treaty from which the principles derive applies to EU policy at Member State level rather than to the EU equivalent of public bodies as is the case for the Continuity Act.

4. *There is also now a UK policy statement on environmental principles. It applies to the development of policy by UK Ministers including when developing policy relating to Scotland in reserved areas. It does not apply to Scotland where the policy does not relate to reserved areas. Do you have a view on whether there is complementarity between the Scottish guidance and the UK policy statement. If not, could this lead to any difficulties on the ground, for instance in relation to cross-border bodies?*

We are not in a position to comment on this other than to highlight that the environmental principles set out in DEFRA’s Environmental principles policy statement, January 2023¹ do not apply to public bodies other than where documents, strategies and frameworks are prepared by public bodies that ministers are required by statute to approve.

5. *Will the guidance help the Parliament, or members of the public, hold the Scottish Government and public bodies to account on their decision-making?*

It is our view that the Guidance will help the Parliament and members of the public hold public bodies to account. In particular, as the duty to have due regard to the principles is a new duty, the way in which this is applied in the course of a SEA can be the subject of a challenge.

The risk of such challenges will be greater while it is less clear how the duty is to be applied in practice and so, as stated above, further examples of how the principles should be applied could aid understanding for anyone using the Guidance.

6. *Any other relevant views you may have on the guidance.*

We have no further comments at this time.

Environmental Governance

I note that your questions are similar to those asked in the consultation on the Review of the Effectiveness of Environmental Governance. The responses below are consistent with the answers provided to the consultation.

7. *Do the provisions of the Continuity Act ensure that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU? These are covered in chapter 2 of the Continuity Act.*

It is our view that effective and appropriate governance will depend on the way in which Environmental Standards Scotland ESS will use its powers to achieve its objectives. It is not yet clear how this will be done.

Chapter 2 of the Continuity Act makes provision for ESS to have powers to act in accordance with regulation by Scottish Parliament and functions to monitor and investigate the extent to which other public authorities comply with environmental law. In this sense the stage is set for additional governance around public bodies. This appears in contrast to the situation under EU law, where public bodies themselves are not the subject of compliance assessments, rather it is the Member State that is assessed. What is less clear at this stage is how the powers and functions of ESS will be exercised, particularly as new science and research becomes available to support the interpretation of compliance with environmental laws and where ESS powers and functions may interfere with the activities, including legal proceedings, of other existing regulators.

In our case, Scottish Water is regulated by SEPA under a suite of environmental legislation relating to water resources and sewerage. We are of the view that where we are acting in compliance with that legislation, and the licences that SEPA has issued to us, and we are abiding by the terms of the agreements that are in place between SEPA and Scottish Water we should not be subject to any action that ESS deems necessary to ensure compliance with environmental law.

ESS options for enforcement include the ability to issue a compliance notice to a public authority. This can be appealed to the Sheriff Court. ESS has the ability to report a public authority to the Court of Session if it fails to comply with a compliance notice and does not appeal it. In contrast SEPA has the power to refer a matter concerning Scottish Water to the Procurator Fiscal when it is robustly justified by evidence. This is in addition to the powers to issue fixed and variable monetary fines. We note the intention of ESS is to resolve matters informally wherever possible, which is a sensible approach. However, we are concerned at the potential for us to be the subject of enforcement action under criminal and civil proceedings by SEPA and ESS at the same time in different courts for the same activity.

We further note that under the proposed legislation ESS would have powers to require information. This could in fact be in conflict with legal proceedings under other legislation, for example, DWQR enforcement notices (legal or civil) proceedings.

8. *Is the law in Scotland on access to justice on environmental matters effective and sufficient?*

We have no comment in this regard.

9. *Could the establishment of an environmental court enhance the governance arrangements introduced by the Continuity Act? And if so, how?*

We have no comment in this regard.

10. *How well do governance arrangements currently support achievement of key policies such as statutory net zero targets, topical environmental quality areas such as air or water quality, or access to environmental justice in Scotland?*

It is too early to comment on the effectiveness of the recently introduced governance arrangements and the powers of ESS as it has yet to be sufficiently tested. The report focuses on new governance measures to fill gaps in environmental law in Scotland that arise from leaving the EU. The report does not comment on existing environmental regulatory institutions, regulations and procedures.

It is not clear whether ESS's assessment of priority areas in terms of compliance and effectiveness will be informed by government policies on net zero and other areas of government environmental priority. The effectiveness of governance will rely on these areas of policy being reflected in legislation and Regulations, with clear duties on bodies who must deliver against these. ESS's purpose is to ensure that public authorities comply with environmental legislation and that environmental legislation is effective. For instance, the net zero targets are enshrined in legislation therefore, if it becomes evident that the targets cannot be met, ESS has the power to investigate and take such action as it deems appropriate within its powers. As a result, ESS should be able to support achievement of the targets, holding Ministers and public bodies to account.

In its Strategic Plan², ESS states that it will ensure that Scotland keeps pace with developments in environmental law and policy, in Europe and elsewhere, and as required by the Act. Whilst we support this intention, we would like to understand how ESS will do this. For example, is it the role of ESS to make recommendations for consideration by Ministers, simply to assess compliance with law in place or to scrutinise where it considers the Scottish implementation is ineffective or falls short?

We hope that you find the responses to your questions helpful. Please get in contact should you have any questions on the above.

I look forward to seeing you again at the NZET Committee meeting on 31st October.

Yours sincerely,

Alex Plant
Chief Executive