

The Environment, Climate Change and Land Reform Committee
UK Withdrawal from The European Union (Continuity) (Scotland) Bill

Submission From Scottish Land & Estates

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Please respond by giving your views within the following headings—

Part 1: Alignment with EU Law

The environmental implications of the keeping pace power potentially leading to substantial policy divergence with the rest of the UK

We are concerned about there being substantial policy divergence throughout the UK and the likelihood that this could impact businesses which currently operate seamlessly throughout the UK.

Whether having powers to keep pace, rather than a duty to do so, is the most appropriate way forward

We are disappointed with the level to which the Bill provides for 'keeping pace' with EU law in devolved areas and indeed its ambition of maintaining the gold standard of EU law – which we feel is weak. It is right that there isn't a duty to keep pace, with a duty we would risk having to introduce new policy which Scotland has had no role in formulating. The power to keep pace if new policy is appropriate for Scotland is acceptable but a duty to keep pace isn't. It is also right that these powers be limited to expire after 10 years.

How keeping pace can be achieved, including within a common frameworks approach

SLE welcomed the agreement between the UK government and devolved administrations on the principles that will underpin the creation of common frameworks. The UK Governments updated Frameworks Analysis Document clearly shows the areas and level of action required in the development of common frameworks. Frameworks will be needed across a broad range of policy activity. Of the 21 policy areas where future legislation may be needed to implement common rules, 15 relate to agriculture, food production or the environment.

Part 2 Environment: Chapter 1 - Environmental principles

Whether the four principles are the right choice and whether other principles or high-level objectives should be included

The environmental principles namely the precautionary, polluter pays, prevention and rectification at the source principles are an integral part of environmental law and should continue as the basis of Scotland's environmental policy.

We are disappointed with the level to which the Bill provides for 'keeping pace' with EU law in devolved areas and indeed its ambition of maintaining the gold standard of EU law – which we feel

is weak. We would welcome the inclusion of the wider range of principles that currently influence policy at EU and Scottish levels to ensure that there is no diminution of environmental quality. Therefore, if Scotland is to live up to its environmental commitment and indeed exceed it, we see no reason why the duty should not be broadened beyond the above four proposed principles and include the principles for: • Non regression • Sustainable development • Integration • Appropriate spatial and temporal scales.

The adoption of the principle of no regression would seek to ensure that there would be no reduction of environmental quality. The inclusion of sustainable development recognises the importance of socio-economic factors and environmental sustainability ensuring a balance in decision making is maintained. Appropriate spatial and temporal scales will ensure environmental issues are addressed at a scale that makes ecological sense and the inclusion of integration would ensure that the environment is taken into account across all policy and decision making and would be consistent with the approach being taken by the UK Environment Bill.

We see no reason why Scotland should not commit and go beyond existing environmental ambitions, while at the same time balancing environmental principles against other principles and priorities.

Whether and how the principles should directly align to the statutory requirements to work to achievement of the Sustainable Development Goals and climate change duties

We believe it is important that the system of environmental principles and governance introduced by the Bill are well aligned and consistent with existing policies. It seems sensible that the principles align to Sustainable Development Goals (SDGs) and climate change duties. Exclusion of SDGs would be difficult to justify given the environment is at the core of each one of the goals, similarly non-alignment to climate change duties would seem equally unjustifiable given the global climate emergency and the importance of ministerial adherence to climate law.

The powers to alter and remove the principles

While the need to develop domestic environmental principles arises from our exit from the EU, we believe it is important that the UK does not take an insular approach to their application and it is important that if needed the principles can be altered to reflect changing European and international standards as well as domestic circumstances. We therefore believe it is appropriate for the Scottish Parliament to have a role in considering whether to make changes to the environmental principles adopted in Scotland and we fully support the affirmative parliamentary procedure set out in the Bill for doing this.

The duty to have regard to the principles – the scope, extent and limitations of the duty and exemptions

We fully support the introduction of a duty to have regard to the principles. The extent to which Scottish Ministers, Ministers of the Crown and Public Authorities must have regard needs to be made clear and it will be important that individuals and organisations have effective guidance as to the necessary standards of conduct. It will be imperative that a consistent approach is taken across the UK jurisdictions to ensure clarity for all and enable internal markets to function without hindrance.

We do believe however that the proposed wording 'have regard' could be strengthened to ensure implementation of the principles in ministerial and public authority decision making and we would suggest changing it to 'act in accordance'. This would remove the possibility of the principles being undermined by decision makers while at the same time still providing decision makers with sufficient flexibility to balance different objectives – a point also made by stakeholders during discussions on the UK Environment Bill.

Whatever the wording, it will be important that there is transparency of the decision-making process in accordance with the principles to allow effective oversight by Environmental Standards Scotland (ESS).

The limit on the application of the principles to environmental policy and regulation and whether these should extend to all areas of policy and regulation

It would be helpful to clarify what is meant by “policy” and if this extends to documents such as strategies and programmes. We recommend that environmental policy is taken into account across all policy and decision making and reflects the comments we made in question 1, on the importance of including the principle for integration in the duty which will ensure the environment is taken into account across all policy and decision making in Scotland.

We note the integration principle is included in the UK Environment Bill and we would welcome a similar approach be taken in Scotland. Adoption of this approach would be consistent with the desire to link this duty with Scottish Government’s objectives and wider structures and would complement the existing approach to national and local decision making in Scotland under the National Performance Framework.

It is of course imperative that the environmental principles operate in a way which balances environmental protection against other priorities and it should be recognised that socio-economic and environmental sustainability go hand in hand (as recognised by the principle of sustainable development). It is fundamental that this balance is maintained.

The interplay between principles set by UK for reserved functions, and those set in Scotland for devolved functions

Since environmental policy is largely devolved, it is right that the Scottish Government pursues environmental governance options that meet Scotland’s needs. However, the environment is not constrained by territorial or political boundaries and the development of common frameworks on the environment between the UK and Scottish Governments will be crucial. It will be important that the ESS and Office for Environmental Protection (OEP) in England develop a strong and collaborative relationship and we believe the requirement to do so needs to be better embedded in the Bill.

The process of development and parliamentary scrutiny of the guidance on principles and duties

It is important that the law is as clear and precise as possible. Scottish Ministers and Public Authorities need to be able to guide their behaviour by a clear understanding of the standards of conduct expected from them by the law. Guidance therefore needs to make clear how any discretionary nature of the principles is to be applied and how they are to be balanced with other factors that influence a decision.

We are supportive of the process for the development and parliamentary scrutiny of the guidance on principles and the duties which place a requirement on Scottish Ministers to consult on the guidance before it is laid before Scottish Parliament. However, we believe the requirement for Scottish Ministers to “consult relevant Public Authorities or other appropriate persons who are subject to the principles duty prior to laying” should be expanded to also include “persons appearing to them to be representative of the interests of local government, industry, agriculture, fisheries or small businesses” and should also include consultation with the OEP – inclusion of the OEP refers back to our earlier point that the environment is not constrained by territorial or political boundaries.

Part 2 Environment: Chapter 2 - Environmental governance

The extent to which the proposals will address the governance issues arising from EU exit

We welcome the establishment of a new body, the ESS which will replace the oversight and enforcement roles of the European Commission, European Court of Justice and other EU bodies. The new body has the potential to fulfil the watchdog role of the European Commission however we have significant concerns about its lack of independence from Scottish Ministers which could prevent it from doing so. These concerns are outlined in more detail below.

The limit of the obligations of ‘public authorities’ and the exclusions

Satisfied with the obligations and exclusions on public authorities.

How the proposed model will align with that proposed for functions in the rest of the UK and for reserved matters in Scotland, through the UK Environment Bill and any potential for gaps in the oversight arrangements; and the ability to co-operate and share data

It is our view that a collaborative and joint approach which respects the devolution settlements in the UK is important to ensure that robust environmental standards are maintained and enhanced; we would urge cross-governmental co-operation to ensure that there is a pragmatic and common-sense approach taken.

While the Bill applies to Scotland, many businesses operate across borders and it is important that there is a coordinated approach to environmental governance across the whole of the UK. It is vital there is strong coordination, cooperation and collaboration between the UK jurisdictions and that there is consistency in dealing with matters that have a cross boundary effect to ensure that any differences in environmental standards and governance across the UK do not lead to negative unintended consequences.

It is therefore important an insular approach to the application of environmental principles is not taken and it would be helpful if a UK-wide policy statement was co-developed across all legislatures setting out how specified environmental principles should be interpreted and applied. This would help remove any political uncertainty of domestic environmental ambition and delivery now and into the future.

It is incredibly important policies are developed holistically so that we have a coherent system which is fit for purpose.

The proposed definitions including public authority, environmental law, failure to comply with environmental law, the effectiveness of environmental law, environmental protection and environmental harm

We are pleased to see the definition of environmental law and environmental protection are the same as that used in the UK bill and welcome this consistency in approach. In respect to the definition on environmental harm we feel greater clarity is needed on the text ‘offence to the senses of human beings’ and how this will be interpreted. We have some concerns that this could be a subjective matter based on perceptual response and there is a risk this could be interpreted differently by different individuals.

The proposed governance arrangements and the procedures required to establish them – including the status and independence of the new public body (the ESS), its functions, powers, duties, structure, governance, membership and strategy

We fully acknowledge that to ensure that retained EU law has the same practical impact, domestic governance mechanisms will be required to take on the functions of existing EU bodies. We have always stated that any new body should be fully independent, well-resourced and operates in a proportional way balancing environmental protection against other priorities and is accountable to the Scottish Parliament. It is important that this body can scrutinise and hold Scottish Ministers and Public Authorities to account.

We have significant concerns about the apparent lack of independence of the ESS which we feel could compromise its ability to act impartially and hold Scottish Ministers and Public Authorities to account and therefore sufficiently carry out its duties. Our concerns are set out below.

- While the ESS is not subject to the direction or control of any members of the Scottish Government there is an exemption within the Bill (Schedule 1. Paragraph 1) which revokes this. We believe the text “is subject to any contrary provision in this or any other enactment” should either be removed or amended and clarity provided on its use.
- Scottish Ministers appear to have significant control and influence over the ESS – including determining terms and conditions of membership and remuneration.
- We also have concerns on the membership of the ESS. In respect to the selection process we believe there should be greater Parliamentary involvement in this and it will be essential that some key areas of expertise are represented on the body to ensure balance. We believe it is important that the body includes adequate representation from both the environmental and private sector – such persons would bring pragmatic and practical expertise.
- Lastly, we have concerns around the adequate financial resourcing of the ESS for which the Bill appears to make no provisions for.

We are supportive of the ESS strategy and the proposed procedure ahead of publication. In terms of a review of the strategy, it would be helpful to have clarity on when a review should take place. It is also unclear what would warrant a review of the strategy.

How the proposals align with existing bodies with statutory functions relating to the environment, and other such oversight bodies such as the Scottish Information Commissioner, Audit Scotland and the Scottish Public Services Ombudsman

The proposals appear to align well with existing bodies that implement environmental delivery and we are pleased to note that the remit of the ESS does not seek to replicate what these bodies already do and that the ability to hold individuals and businesses to account remains with Public Authorities.

Alternative approaches to environmental governance

We would welcome a much more joined up approach across the UK where the whole of the UK is looking to achieve stated environmental goals.