

ENVIRONMENTAL PRINCIPLES AND GOVERNANCE IN SCOTLAND: A RESPONSE TO THE SCOTTISH GOVERNMENT

Following the report from the Roundtable on Environment and Climate Change last year, the RSE expected the consultation to provide a wider perspective on the environmental principles to be adopted and a clearer indication of the Scottish Government's intended approach on environmental governance post Brexit. We would be pleased to contribute to work in this area.

The RSE strongly believes that all public authorities and Scottish Government should be bound by the duty to respect environmental principles. Ministers and public authorities are used to making complex decisions while balancing a range of different and sometimes competing objectives. The need to take account of environmental principles need not fetter the discretionary flexibility of public authority decision making. This approach would also be in line with the National Performance Framework where public authorities are already required to take account of values relating to the environment, social and economic well-being.

Taking account of the wider range of environmental principles that currently influence policy at EU and Scottish levels, the duty should be broadened beyond the four currently proposed environmental principles (precautionary, polluter pays, prevention and rectification at source). We recommend the adoption of the principle of 'no regression' since this would seek to ensure that there should be no diminution of environmental quality. We also recommend the inclusion of the 'integration' principle to ensure that the environment is taken into account across all policy and decision making. There remain areas of deterioration in environmental quality, including biodiversity loss and air quality, which we consider need to be addressed through more proactive application of a wider range of principles.

The loss of independent oversight by the EU Commission presents a significant challenge to ensuring the maintenance of environmental standards in the UK. There is currently no body in the UK or Scotland that could replace the independent, supranational scrutiny and assessment role of the EU Commission. The RSE is firmly of the view that a body independent of Scottish Government needs to be established in Scotland to monitor, assess, report on environmental quality and adherence to regulations and standards, act on complaints and take enforcement action against Government and public authorities to ensure the protection of the environment. The body should be accountable to the Scottish Parliament. It will need to be sufficiently resourced, both in terms of the recruitment of skilled personnel and access to finance.

Since environment 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. The development and agreement of common frameworks on the environment between the UK and Scottish Governments will be crucial. It will be important that the new independent body in Scotland and the Office for Environmental Protection for England proposed by UK Government develop a collaborative relationship.

The European Environment Agency (EEA) is an agency of the EU charged with providing sound, independent information on the environment to policy makers and the public. The RSE recommends that Scotland should seek a continuing relationship with the EEA post-Brexit, either as part of the UK or, potentially, by applying to join in its own right.

Summary

Introduction

1 The Royal Society of Edinburgh (RSE), Scotland’s National Academy, welcomes the opportunity to respond to the Scottish Government’s consultation on Environmental Principles and Governance in Scotland.¹ The RSE is well placed to respond having published a paper in November 2018 considering the implications of the UK’s withdrawal from the EU on the environment in Scotland.² We draw upon this paper in our response since it covers the key areas being consulted upon by Scottish Government, particularly in relation to the implications of Brexit for maintaining key environmental principles and for potential arrangements for environmental governance in Scotland. This complements the work the RSE has undertaken to inform and influence Brexit-related developments in relation to research and innovation; constitutional law and government; migration; and economy and public finance.

Background

2 While on the one hand we welcome the open-ended nature of the consultation, at this stage we would have expected a clearer indication of the Scottish Government’s intended policy options. Given that the Roundtable on Environment and Climate Change report to the Scottish Government identified a range of options,³ we had expected the consultation paper to give a steer on the Government’s preferred options. The consultation is silent on next steps and the timescale. There is an urgency in the situation to ensure that new arrangements, some of which will require further consultation and will take time to implement, are in place by the time the UK leaves the EU. We request that the Scottish Government set out now its preferred options on future environmental governance and a wider set of environmental principles. The RSE would be pleased to discuss its comments with the Scottish Government

Environment and Land Use Strategy Team and contribute to further developments in this area.

3 We recognise that the focus of the consultation is on how environmental standards can be upheld in Scotland following the UK’s departure from the EU. However, there is no reference in the consultation to the relationship between the Scottish and UK Governments regarding their respective environmental governance agendas. The UK Government, through its Draft Environment (Governance and Principles) Bill 2018,⁴ proposes a set of environmental principles that will underpin policy making in England, as well as the establishment of an independent Office for Environmental Protection. The present Scottish Government consultation seeks views on future arrangements for the application of EU environmental principles and the design of governance arrangements. Since environment policy is largely devolved, it is right that the Scottish Government pursues post-Brexit environmental governance options that meet Scotland’s needs. However, the environment is not constrained by territorial boundaries. In its recent report, the House of Commons Environmental Audit Committee cautioned that, “without common frameworks there will be little to prevent a decline in the quality of transboundary natural assets, such as air, water and biodiversity, should a future Government decide to reduce their protections or not create new targets for improvement.”⁵ The development and agreement of common frameworks on the environment between the UK and Scottish Governments will therefore be crucial. Recognising that the current arrangements for intergovernmental relations in the UK are not fit for purpose,⁶ the RSE has proposed that an independent secretariat comprising input from all governments in the UK, should be created to oversee the development and operation of common frameworks.⁷

1 Consultation on Environmental Principles and Governance in Scotland; Scottish Government; 2019 <https://consult.gov.scot/environment-forestry/environmental-principles-and-governance/>

2 The Implications of Brexit on Scotland’s Natural Assets; RSE; November 2018 <https://www.rse.org.uk/wp-content/uploads/2018/11/Brexit-Environment-Paper.pdf>

3 Report on Environmental Governance in Scotland after EU Withdrawal – Assessment and Options for Consideration; Sub-Group of the Environment and Climate Change Roundtable; prepared for Scottish Government; May 2018 <https://www.gov.scot/publications/report-roundtable-environment-climate-change-environmental-governance-scotland-uks-withdrawal/>

4 UK Government Draft Environment (Governance and Principles) Bill 2018 <https://www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018>

5 Scrutiny of the Draft Environment (Principles and Governance) Bill; House of Commons Environmental Audit Committee; 24 April 2019 <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf>

6 Devolution and Exiting the EU: reconciling differences and building strong relationships; House of Commons Public Administration and Constitutional Affairs Committee; July 2018 <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/148502.htm>

7 RSE Advice Paper to Scottish Parliament Finance and Constitution Committee on the development of Common Frameworks; August 2018 <https://www.rse.org.uk/wp-content/uploads/2018/10/AP18-15.pdf>

- 4 The RSE welcomes the commitment from Scottish Government that there should be no dilution in the implementation and enforcement of environmental regulations in Scotland post-Brexit. In previous advice papers, including our recent paper on the implications of Brexit for Scotland's environment, the RSE has commented on the need to ensure a more integrated approach to policy making to minimise the potential for sectoral conflicts.⁸ We welcome the updating in 2018 of Scotland's National Performance Framework (NPF), now underpinned by the UN Sustainable Development Goals. The NPF seeks to ensure that public bodies take account of environmental, social and well-being factors in their decision making. However, there is scope to take this further. In Wales, the Well-Being of Future Generations (Wales) Act 2015 provides an integrated framework with sustainable development at its core with the objective of improving the economic, social, environmental and cultural well-being of Wales.⁹ All public bodies in Wales are required to make decisions and act in accordance with this sustainable development framework, including taking account of the longer term implications of decisions they make now. We consider that this model should be given serious consideration for Scotland, especially given the First Minister's early and welcome commitment to Scotland signing up to the UN Sustainable Development Goals.
- 5 We recognise the importance of the human rights dimension to the environment, and especially the rights and benefits accruing to people from a 'well-cared' for natural environment. The consultation recognises this connection and indicates that the Scottish Government is considering the development of a new human rights framework, including the potential inclusion of environmental rights. It is not clear on what timescale the proposed Human Rights national taskforce will work. It will be important to ensure good lines of communication between the proposed taskforce and those leading the developments on environment principles and governance. However, there may not be time to await the outcome of the taskforce before the Scottish Government considers formalising in domestic law the Aarhus Convention rights of the public with regard to the environment.

Responses to Questions

Application of environmental principles duty

Question 1: Do you agree with the introduction of a duty to have regard to the four EU environmental principles in the formation of policy, including proposals for legislation, by Scottish Ministers?

- 6 As a minimum, the four EU environment principles enshrined in Article 191 (2) of the Treaty of the Functioning of the European Union, namely the precautionary, polluter pays, prevention and rectification at source principles, should be included in the duty. There is, however, scope for the Scottish Government to show more ambition to match its commitment to maintaining and exceeding EU environmental standards. A narrow focus on the four environmental principles specified above fails to take account of the wider range of environmental principles that currently influence environmental policy at the EU and Scottish levels. We return to this issue in our response to question three.
- 7 The RSE is concerned that the proposed formulation of the duty 'to have regard to' could undermine the application of the principles in ministerial and public authority decision making. We believe that the legal duty should be strengthened, given the accumulated evidence of the weakness of the 'have regard to' duty. A duty 'to ensure respect for' or 'to act in accordance with' the principles would help to address this concern while providing decision makers with sufficient flexibility to balance different objectives.

Question 2: Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?

- 8 The RSE strongly believes that the duty should include **all** public authorities in Scotland, as well as Scottish Ministers. The Scottish Government's preferred option that the duty should apply only to Scottish Ministers could result in the EU-derived environmental principles being disregarded by public authorities. In our response to question one we make clear that it is our view that both Ministers and public authorities are used to making complex decisions while balancing a range of different and sometimes competing objectives. In this context, proportionality will be important in interpreting how the environmental principles interact with economic and social objectives at higher levels of decision making.

⁸ The Implications of Brexit on Scotland's Natural Assets; RSE; November 2018

⁹ Well-being of Future Generations (Wales) Act 2015 <http://futuregenerations.wales/about-us/future-generations-act/>

The need to take account of the environmental principles in decision making need not fetter the discretionary flexibility of public authority decision making. Public authorities are already required to develop outcomes consistent with the National Performance Framework national outcomes, taking account of values relating to the environment, social and economic well-being. The inclusion of the environmental principles would therefore complement the existing approach to decision making in Scotland.

Scope of environmental principles to be covered by the duty

Question 3: *Do you agree that a new duty should be focused on the four EU environmental principles? If not, which other principles should be included and why?*

9 Further to our response to question one, we recommend that the principles contained within the duty are broadened beyond the four that are currently proposed. It is not clear to us why other environmental principles derived from EU law and international agreements are not included. We note that the UK Government's Draft Environment (Governance and Principles) Bill 2018 includes not only the four environment principles proposed by Scottish Government, but a further five reflecting existing EU law and international agreements, including also the complementary issue of the rights of the public with regard to the environment enshrined in the UN Aarhus Convention.

10 Given the Scottish Government's commitment to maintaining and exceeding EU environmental standards, we recommend adoption of the principle of *no regression* since this would seek to ensure that there should be no diminution of environmental quality arising from decisions by government and public bodies. As we noted in our previous advice paper, there remain areas of deterioration in environmental quality, including biodiversity loss and air quality, which we consider need to be addressed through more proactive principles. The recent report from the UN Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) provides a stark assessment of the unprecedented global decline in nature and the impact of this on people around the world.¹⁰

11 Reflecting on our opening remarks, the RSE also recommends including the *integration* principle in the duty to ensure that the environment is taken into account across all policy and decision making in Scotland. This would complement the existing approach to national and local decision making in Scotland under the National Performance Framework. It is a crucial means to ensure that the UN Sustainable Development Goals, already committed to by the First Minister, are fully embedded in policy and decision making at all levels. We note that the integration principle is included in the UK Government's draft Bill.

Implementation

Question 4: *Do you agree there should be an associated requirement for a policy statement which would guide the interpretation and application of a duty were one to be created?*

12 Yes, we agree that a policy statement of this kind will be crucial to guide the interpretation and application of the duty relating to the environmental principles. A separate consultation should be held on the formulation of this policy statement. This will not only help to raise awareness of the duty and guide its interpretation and application, but it will also enable public authorities who, in our view should be subject to the duty, to shape the development of the policy statement.

Environmental governance arrangements

Question 5: *What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?*

13 The consultation document correctly highlights the key impacts stemming from the potential loss of engagement with the EU on monitoring, measuring and reporting, namely: the ability to use EU systems to facilitate reporting and contribute to developing methodologies; the ability to aggregate data at European level and assess UK progress on a comparative basis; and access to wider expertise, systems and data. The Roundtable on Environment and Climate Change reported that, "gathering and comparing robust environmental data are essential to support evidence based policy making".¹¹ We are particularly concerned about losing the ability to benchmark Scottish and UK performance against other EU nations in a structured and consistent way. In turn, there is likely to be far less opportunity to learn from other EU nations and share experiences and good practice.

¹⁰ UN IPBES Global Assessment Summary for Policy Makers; May 2019 <https://www.ipbes.net/news/ipbes-global-assessment-summary-policy-makers-pdf>

¹¹ Report on Environmental Governance in Scotland after EU Withdrawal – Assessment and Options for Consideration; Sub-Group of the Environment and Climate Change Roundtable; prepared for Scottish Government; May 2018

- 14** It is important, therefore, that the gap created by the loss of engagement with the EU on the environment is filled. We believe that the independent body that we propose be created in our response to question eight would be best placed to fulfil this role. Not only would the independent body investigate complaints and address infringement issues relating to the environmental performance of Scottish Ministers and public authorities, it could gather and analyse data, commission studies and publish peer-reviewed reports. This will be required to address the environmental governance deficit arising from the UK's withdrawal from the EU. The new independent body will need an horizon scanning function to ensure that Scotland can keep track of EU developments on the environment.
- 15** The European Environment Agency (EEA) is an agency of the European Union charged with providing sound, independent information on the environment to policy makers and the public. EEA membership comprises all EU Member States as well as five other countries.¹² There appears to be no formal inhibition to a non-EU Member State applying to join the EEA. The RSE recommends that Scotland should seek a continuing relationship with the EEA post-Brexit, either as part of the UK or, potentially, by applying to join in its own right.
- 16** In addition, seven thematic topic centres¹³ comprising networks of highly regarded research institutes throughout Europe support the work of the EEA. Following the UK's withdrawal from the EU, there will be no comparable source of customised scientific and technical advice to the UK and the devolved administrations when considering future environmental strategies, plans, policies and legislation or when seeking evidence of the efficacy of existing policies. The RSE recommends that Scotland develops an association with these topic centres to allow exchange of information on scientific knowledge and best practice.
- 17** It is important to recognise that the EEA and the European Topic Centres do not represent the totality of EU regulatory bodies and networks with environment-related interests and oversight. The UK's withdrawal from the EU means that unless an agreement is secured that will enable third country access, the UK will no longer be able to participate in the European Chemicals Agency,

the European Integrated Pollution Prevention and Control Bureau and the European Community Urgent Radiological Information Exchange, among others. Adherence to the standards set is, in any case, likely to be required as part of any future trading arrangement between the UK and EU. The potential loss of participation in and, access to, these arrangements emphasises the importance of developing mechanisms to maintain at least equivalence with EU environmental standards as part of the independent agency we propose.

- 18** In this context, and more widely, the RSE considers that the UK should be seeking the closest possible relationship with the EU on research and innovation post-Brexit, including continued participation in EU Framework Programmes for research. The maintenance of our academic skills base will be important to ensuring provision for monitoring and reporting on the environment. Scotland is well placed to continue to make available objective, scientific evidence on the environment, with the expertise of government agencies, research and higher education institutions spanning the areas of the environment, food, agriculture, land use, forestry, water, climate, soils, health, rural economy, communities, animal and plant disease and biodiversity. However, the potential loss of UK-EU research mobility and collaboration post-Brexit, coupled with considerable uncertainty about the UK's future participation in EU framework programmes for research, remain very significant issues that need to be addressed.

Question 6: *What key issues would you wish a review of reporting and monitoring requirements to cover?*

- 19** The RSE welcomes the Scottish Government's commitment to review future environmental reporting and monitoring requirements given that existing requirements will no longer apply once the UK leaves the EU. The RSE would be pleased to contribute to the review. We agree that Brexit provides an opportunity to clarify and consolidate reporting requirements but in a way that does not downgrade the need for regular gathering of and, reporting on, environmental data in Scotland.

¹² Iceland, Liechtenstein, Norway, Switzerland and Turkey.

¹³ The seven European Topic Centres cover: Air pollution, transport, noise and industrial pollution; Biological diversity; Climate change impacts and adaptation; Climate Change mitigation and energy; Inland, coastal and marine waters; Urban, land and soil systems; and Waste and materials in the green economy.

The review will need to consider who will become the primary recipients of future reports given that the existing requirement to report to the EU Commission is likely to be redundant. The independent body that we propose is likely to be a key recipient of reports generated by Government agencies and research institutions. Additionally, there should be no legal obstacle to the sharing and co-production of data with appropriate bodies across the UK and beyond. Building on our response to the preceding question, the review should consider the scope for Scotland to continue to have a relationship with the EEA, particularly given the role of this Agency in checking data quality and providing benchmarking information. We recommend, therefore, that Scotland should ensure that reporting and monitoring is closely aligned with EU requirements. We suggest that Scottish Government should take account of the findings of the EU Fitness Check of Environmental Monitoring and Reporting published in 2017.¹⁴

Scrutiny of government performance

Question 7: Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?

20 The loss of independent oversight by the EU Commission presents a significant challenge to ensuring the maintenance of environmental standards in the UK. While both the UK and Scottish Governments have stated that there should be no dilution in the implementation and enforcement of environmental regulations, there is currently no body in the UK or Scotland that could replace the independent, supranational scrutiny and assessment role of the EU Commission and the EU institutions. It is for this reason that we recommend the establishment in Scotland of an independent body with responsibility for monitoring, assessing, reporting on environmental quality and adherence to regulations and standards, receiving complaints and taking enforcement action against Government and public authorities to ensure the protection of the environment. In our response to question eight, we set out in more detail our proposal for the creation of an independent body in Scotland with environmental oversight.

Question 8: How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?

- 21** The RSE considers it essential that an independent body be established in Scotland to lead scrutiny of Government and public authority performance in relation to the environment. This is necessary to compensate for the loss of oversight by the EU Commission post-Brexit. Existing bodies with responsibilities relating to the environment, including the Scottish Environment Protection Agency (SEPA) and Scottish Natural Heritage (SNH), are executive Non-Departmental Public Bodies (NDPBs) which carry out regulatory functions on behalf of the Government and operate within a framework of governance and accountability set by Scottish Ministers. While SNH and SEPA undertake valuable work in supporting the quality of Scotland's environment, they are not independent of Government and so cannot hold the Government to account on its environmental obligations. The RSE is firmly of the view that a body independent of Government needs to be established to scrutinise and review Government performance on the environment. The experts on the Scottish Government's Roundtable on Environment and Climate Change also recognised the importance of ensuring that this analysis and scrutiny function is undertaken by a fully independent body.
- 22** We note the intention of the UK Government to establish a statutory and independent Office for Environmental Protection (OEP) to scrutinise environmental policy and law, investigate complaints and take action where necessary to make sure environmental law is properly implemented.¹⁵ The OEP would exercise its functions in England and would not have any responsibility over environmental legislation that is within the competence of the devolved legislatures. The UK Government's Draft Environment Bill does leave open the possibility that the OEP could exercise its functions more widely across the UK. However, this would require an agreement between the UK Government and the Devolved Administrations. Since environmental responsibilities are largely devolved to Scotland and given the different starting positions of UK Government and the Scottish Government, it seems unlikely that, at least in the near term, an agreement would be reached to give the OEP oversight of environmental governance in Scotland.

¹⁴ Support to the Fitness Check of monitoring and reporting obligations arising from EU environmental legislation; EU Commission; March 2017 http://ec.europa.eu/environment/legal/reporting/fc_overview_en.htm

¹⁵ UK Government Draft Environment (Governance and Principles) Bill 2018 <https://www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018>

There is, therefore, a need to establish in Scotland a new independent body to assess and take action on environmental performance. It will, however, be important that the new independent body in Scotland and the OEP develop a collaborative relationship since the environment is not constrained by territorial or political boundaries. This links back to our opening remarks on the need to develop and agree common frameworks on the environment.

- 23** Given that the independent body that we propose will have a role scrutinising the environmental performance of Scottish Government, it is crucial that it be truly independent from Government and seen to be so. It should not, for example, be constituted as an NDPB as the consultation paper suggests. Rather, the new body should be accountable to the Scottish Parliament and this would include providing the Parliament with regular reports on its work. In order to carry out its duties this body will need to be sufficiently resourced, both in terms of the recruitment of skilled personnel and access to finance. In order to ensure the body's independence, consideration should be given to funding the body from the Scottish Consolidated Fund operated by the Scottish Parliament. Key board and staff appointments should be subject to Parliamentary approval.
- 24** In order to ensure that there is no ambiguity between the role of the independent body in providing information and advice and its responsibility for compliance and enforcement, consideration could be given to establishing a 'firewall' to distinguish between these functions. We note that the Accounts Commission holds local authorities to account on their financial performance while also producing reports that provide practical support to help councils continue to improve their performance. The consultation paper also recognised that in practice, it is likely that the different parts of environmental governance would be provided for in a single institutional arrangement. Therefore, having dual roles encompassing scrutiny and support does not seem to be incompatible, so long as the body is fully independent of Government.

Question 9: *Which policy areas should be included within the scope of any scrutiny arrangements?*

- 25** The policy areas included in the suggested framework provide a helpful start. However, we believe that they would benefit from further work to ensure that all appropriate policies are covered by the framework and to avoid scrutiny gaps opening up following the UK's departure from the EU. The framework should also be reviewed periodically. The framework could be expanded to include, for example, nanomaterials, pathogens, noise and light pollution, and access to and enjoyment of the environment. We also note that, while they are combined in the draft framework, soils and contaminated land are quite different policy areas. The RSE would be pleased to work with Scottish Government in the development of the scrutiny framework.

Considering complaints

Question 10: *What do you think will be the impact in Scotland of the loss of EU complaint mechanisms?*

- 26** Leaving the EU will bring an end to the investigative role of the European Commission and the direct jurisdiction of the Court of Justice of the European Union (CJEU). It is crucially important that this governance gap be addressed. Between 2003 and 2016, 46% of CJEU judgements involving the UK related to the environment. Of these 29 cases, 21 were found in the European Commission's favour, four in the UK's favour and four with mixed outcomes.¹⁶ There is a mechanism by which third parties, including NGOs and individuals, can raise complaints free of charge with the Commission about infringements by Member States.¹⁷ The Commission has therefore helped to ensure that Member States take their environmental duties seriously and the European Commission's ability to raise enforcement actions against Member States can have a deterrent effect. There is no existing domestic complaints mechanism which would adequately replace EU arrangements. Given constraints on their scope to investigate, their lack of specialist environmental expertise and limited remedies, neither the Scottish Public Sector Ombudsman (SPSO) nor the Scottish Parliament's Petitions procedures provide a substitute for the current complaints mechanism before the Commission.

¹⁶ Who's Afraid of the ECJ?, Chartering the UK's relationship with the European Court, Institute for Government, December 2017 https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_ECJ_v10FINAL%20web.pdf

¹⁷ Complaint Form for breach of EU law https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/index.html

In bringing a complaint to the Commission, individuals do not have to show that their individual interests have been affected and the complaint can be individually focused or relate to law and policy more broadly. It will be crucial, therefore, that there is a transparent, independent and adequately resourced complaints arrangement post-Brexit to ensure that the Scottish Government and public authorities can be called to account for their decisions and performance relating to the environment.

Question 11: *Will a new function be required to replace the current role of the European Commission in receiving complaints from individuals and organisations about compliance with environmental law?*

27 Yes. As our response to question 10 makes clear, this will be necessary to compensate for the loss of access to EU complaint mechanisms. As we have stated in our previous responses, the independent body we have proposed should have responsibility for receiving, investigating and enforcing complaints relating to the environmental performance of Scottish Ministers and public authorities. The new body would be required to develop and publish a complaints procedure making clear the types and nature of complaints it is likely to investigate.

Enforcement

Question 12: *What do you think the impact will be in Scotland of the loss of EU enforcement powers?*

28 In line with our responses to previous questions, the UK's withdrawal from the EU means that the

Commission and the CJEU will have no role in enforcing compliance by the Scottish Government with environmental law. Unless suitable alternative arrangements are developed, there is a risk that a visible weakening of enforcement powers will reduce deterrence.

29 Domestically, the main mechanism to challenge failures in the implementation of environmental law or a decision by a public body, including the Scottish Government, is through judicial review. However, this is expensive, subject to strict time limits and it does not consider the merits of a decision. Rather, it focuses only on the reasonableness of a decision and procedural propriety. The remedies available to the court are discretionary, very rarely provide damages and are limited usually to a requirement for the public body to review its decision.

Question 13: *What do you think should be done to address the loss of EU enforcement powers? Please explain why you think any changes are needed?*

30 As we have stated in previous responses, we believe that the new independent body should be able to take enforcement action against Scottish Ministers and public authorities. This should include the power to order interim measures to ensure that no harm is done pending consideration of the merits of the issues. The independent body should have the power to initiate court proceedings and bring legal actions. However, like EU Commission infringement proceedings, it is envisaged that most complaints would be resolved without the need to resort to court action. The role of the independent body in taking enforcement action would not preclude recourse to judicial review.

Additional Information

Any enquiries about this Advice Paper should be addressed to Mr William Hardie (email: whardie@theRSE.org.uk)

Responses are published on the RSE website (<https://www.rse.org.uk/>)

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