

A response from the John Muir Trust**Consultation questions****1. Do you have any comments on our Vision and Mission Statement?**

The vision speaks to protecting people from harm but not to protecting nature and wild places from harm. Protecting nature and wild places from harm is also protecting people from harm. We would like to see the vision speaking to harms to people and nature.

The vision could be more complete by referring to ‘the consistent application of effective environmental laws and standards’. Referring to standards in the vision would support other ways the ESS has communicated what it does – for example an introductory leaflet states ‘We’ve been set up to ensure environmental laws and standards are adhered to in Scotland, replacing the European Union’s scrutiny and enforcement role after Brexit.’ For our part, the John Muir Trust would like to see Scotland adopt, implement and enforce higher standards for landowners so that Scotland’s land contributes towards reducing and mitigating effects of climate change and also land management choices translate directly into biodiversity recovery.

On the mission, it would help to define ‘environmental laws’ and ‘standards’ somewhere in the strategy or in guidance notes. This would help organisations or individuals to know whether to approach the ESS about the enforcement of a specific standard or provision in law.

2. Do you have any comments on our Strategic Outcomes?

These are focused outcomes that we support.

On the monitoring and evaluating strategic objective, we would hope that the ESS would detect when systematic failures are a lack of law or standards and that they would take action to bring about improvements such as through recommending the creation of new standards or the stronger enforcement of standards or compliance with law. Working with NatureScot, SEPA and the Scottish Government, the ESS could have a role in monitoring the effectiveness of any new standards for land managers in Scotland. This could include monitoring revised Land Rights and Responsibilities.

3. Do you have any comments on our Values and Principles?

All seem sound.

On principle 1, there might be some initial trial and error to understand where ESS contribution is needed or is likely to make most of a difference, with a view to considering the work or role of others. Where the ESS discovers that they can’t add the most value, but has already put time and resources into a matter that fits within the ESS vision and mission, can they ensure that they work with others who can add the most value to achieving an outcome in line with the ESS vision and mission?

4. Do you have any comments on our proposed approach to resolving matters informally with public authorities?

To aid transparency (one of the ESS values) when matters are resolved informally, we suggest it would be good practice if:

- ESS keeps the person or individual that submitted the representation updated on progress towards a resolution and also provides a report on resolution.
 - ESS keep a record of all cases and any future spot checks to ensure they are still compliant based on the level and intent assumed in previous breaches.
 - ESS provides public information or updates about the cases it is informally resolving with public bodies.
5. Do you have any comments on our proposed approach to determining what constitutes a systemic failure?

On the definition of what constitutes a 'systemic failure' as set out in the draft strategy ('Systemic failure – 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 would expect the absence of a standard and the absence of explicit identification of whose responsibility it is to meet a standard (for example, individual or corporate responsibility to meet future national targets for biodiversity recovery and natural carbon storage or, perhaps even, a future wild places standard) to qualify as systemic failures.

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?

Where compliance failures are systemic due to lack of resources and capacity then issuing an improvement report with recommendations to the Scottish Government sounds more helpful for long term improvement than issuing a compliance notice. There might be circumstances when it makes sense to issue both a compliance notice and an improvement report given the target audiences, and remedial actions required, could differ slightly. An example of where we see a role for an improvement report and compliance notices working in tandem is in improving how effectively Local Authorities monitor and enforce planning conditions. With too few specialist planning enforcement officers in the planning departments of Local Authorities to do this work, planning conditions intended to reduce environmental harm are not being monitored and enforced and subsequently Local Authorities are not upholding Enforcement Charters and planning legislation intended to safeguard the environment is not effective. An improvement report to the Scottish Government, which is in a position to support Local Authorities to address issues of resource and capacity, would highlight patterns of failure across different Local Authorities whilst a compliance notice could be tailored at a particular Local Authority.

7. Do you have any comments on our proposed approach to determining whether a compliance failure or environmental harm is serious?

It looks like Paragraph 4.20 needs to be re-worded so that the subject is compliance failure rather than environmental harm. Paragraph 4.21 considers environmental harm.

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

We suggest consulting the Environmental Rights Centre for Scotland at the 'Preliminary evidence gathering, validation & prioritisation' stage.

When taking into account the 'importance' of a matter, we suggest considering whether the matter threatens national targets for carbon, climate change and biodiversity.

When taking into account 'neglect' as a factor, we suggest considering whether the matter could further worsen rapidly if immediate action is not taken and whether there is evidence the matter was intentional, or intentionally taking advantage of a systemic failure.

9. Do you have any comments on our proposals for monitoring compliance and effectiveness, and taking account of different types of information?

Paragraph 6.6, environmental NGOs and landowners could also help with data gathering to address gaps in evidence. We suggest ESS consider data and intelligence from Scotland's environmental NGOs, universities and companies. These organisations gather and monitor the environment in different ways as part of their programmes of work or business activities. They have insights and monitoring data on habitats, species, the condition of protected sites, quality of water or soil which could all be data that could inform ESS investigations. We would also expect the ESS to work with the Scottish Law Commission and the Law Society of Scotland (to reach legal practitioners for views) where monitoring compliance and effectiveness points to a need to reform legislation.

10. Do you have any comments on our draft priority topics for further analysis?

We welcome the inclusion of 'land and soils' in the priority topics for analysis. We recommend this covers land use and planning development, with reference to native habitats, their protection and restoration. Scotland's wild places, native habitats and species are under pressure from land use change. Planning Authorities have a responsibility for monitoring whether planning conditions are complied with (some of these conditions are imposed to protect or restore native habitats and/or species). However, Local Planning Authorities are under pressure (insufficient staff, absence of ecological expertise, under-funded teams) with risk of critical absence of scrutiny of whether planning conditions are followed through. We believe the effectiveness of Local Authorities in monitoring and evaluating the impacts of approved development on land is worth further analysis by the ESS. This could include looking at whether Local Authorities have the resource and capacity to follow their Enforcement Charters.

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?

No comment

12. Do you have any comments on our proposed approach to receiving and handling representations?

Being transparent about representations by making information about representations available to the public would help people and organisations to understand the types of environmental concerns the ESS is and has been dealing with. This could encourage greater participation in the reporting process. It could also be a way of inviting people and organisations to come forward with any relevant information at the investigation stage.

13. Do you have any comments on how we maintain our ambition to be a high performing organisation?

Encouraging inclusion and diversity is an important consideration for any organisation seeking to remain relevant. We would welcome some reference to how ESS will ensure its structure and governance respects and promotes diversity and inclusion. This will also influence the effectiveness of ESS's work and the amount of trust it gains from people in the community. We also recommend continued engagement in an open and inclusive way with eNGOs, companies, communities, land owners and other non-governmental groups to seek diverse opinions and contributions.

14. Do you have any comments on our proposed approach to measuring our impact?

No comment

15. Do you have any comments on our proposed key performance indicators?

No comment

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

No comment

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

No comment

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

No comment

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

No comment

