



Analysis of Responses  
**Consultation on  
Environmental Principles  
and Governance in Scotland**

**September 2019**

Conducted for



Scottish Government  
Riaghaltas na h-Alba  
gov.scot

EXECUTIVE SUMMARY .....	1
<b>1.</b> Introduction .....	5
<b>2.</b> Environmental principles .....	8
<b>3.</b> Environmental governance arrangements: monitoring, measuring and reporting .....	22
<b>4.</b> Environmental governance arrangements: performance .....	28
<b>5.</b> Environmental governance arrangements: considering complaints.....	36
<b>6.</b> Environmental governance arrangements: enforcing action .....	41
<b>7.</b> Conclusions .....	49
Appendix 1: Approach to analysis and reporting .....	50
Appendix 2: Quantitative summary of responses (where available) .....	51
Appendix 3: Chapter 3, Q1.....	52
Appendix 4: Chapter 4, Q2.....	54
Appendix 5: Chapter 5, Q3.....	55
Appendix 6: Chapter 6, Q4.....	56
Appendix 7: Chapter 7, Q5.....	58
Appendix 8: Chapter 3, Q6.....	60
Appendix 9: Chapter 4, Q7.....	64
Appendix 10: Chapter 4, Q8.....	67
Appendix 11: Chapter 4, Q9.....	68
Appendix 12: Chapter 5, Q10.....	72
Appendix 13: Chapter 5, Q11.....	73
Appendix 14: Chapter 5, Q12.....	74
Appendix 15: Chapter 5, Q13.....	75
Appendix 16: Summary of consultation questions.....	78

## EXECUTIVE SUMMARY

- i. The national consultation on Environmental Principles and Governance in Scotland is part of a range of activities undertaken by the Scottish Government (SG) to establish and prepare for the risks associated with European Union (EU) withdrawal. The consultation received 99 direct responses from a range of individuals and organisations. In addition to this the consultation received 12,051 e-action responses as part of the campaign led by Scottish Environment LINK entitled, 'Fight for Scotland's Nature'.

### **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?**

- ii. Over two thirds (70%) of respondents selected 'yes', 5% selected 'no', 1% selected 'don't know' and 24% did not answer the question. Expressions of support for the duty were prevalent in comments.
- iii. Respondents also mentioned specific concerns to be addressed. Key issues included the proposed wording of the duty and a belief that the language could be strengthened.
- iv. Others commented on the potential to be more ambitious and to incorporate additional principles in the duty, and on linking the duty to a wider environment strategy. A few respondents did not support the proposal, primarily because they wanted to see something more ambitious or different to the current EU approach.

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

- v. The second consultation question was the least popular of the proposals put to respondents; one fifth (21%) selected 'yes', 38% selected 'no', 14% selected 'don't know' and 26% did not answer the question.
- vi. Across the detailed responses to this question there were a number of different perspectives on where the duty should extend and why. Expressions of disagreement dominated the comments. In many cases this was due to a belief that the duty should be extended, either to all functions exercised by Scottish Ministers and public authorities or to specific named organisations. Some respondents described their support for the proposal.
- vii. Many highlighted the potential for confusion or conflict with other duties or responsibilities if the duty was extended beyond the remit proposed in the consultation.

### **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?**

- viii. Just under half (41%) selected 'yes', 28% selected 'no', 3% selected 'don't know' and 27% did not respond.
- ix. Across the detailed responses to this question there were a range of perspectives which varied depending on the interpretation of the question. Roughly half indicated agreement with the inclusion of the four principles but most of these respondents indicated that other principles should also be included; in particular, sustainable development, integration, non-regression and keeping pace.

- x. Just under half of respondents indicated they did not support the proposal. Again, this was due to a belief that additional principles should be included. A large number mentioned human rights in their comments.
- xi. Some respondents discussed the need to consider actions taken by the UK (particularly in relation to the UK Government's Draft Environmental Bill) or other devolved governments, to ensure consistency where possible in the principles being referred to. Alternatives to the approach outlined in the consultation document were also identified in responses.

**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?***

- xii. Over two thirds (69%) selected 'yes', 2% selected 'no', 4% selected 'don't know' and 25% did not answer the question.
- xiii. Expressions of agreement were most prevalent across the comments. Another key strand in the discussion was other areas for consideration. These included the process of developing the statement, the interplay between the statement and the duty and legislation, and suggested content of the statement.
- xiv. A small number of respondents did not support the proposal, for individual reasons.

**Question 5<sup>1</sup>: *What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?***

- xv. The dominant theme in comments was reflection on the value of current EU monitoring, measuring and reporting arrangements. Many respondents called for current arrangements and requirements to continue post EU exit.
- xvi. Second most common was concern that the loss of engagement with the EU on monitoring, measuring and reporting will result in generally lower standards. Another reoccurring theme was a reflection that loss of engagement with the EU could impact negatively on Scotland's ability to participate in networks and/or collaborative working.
- xvii. Loss of data aggregation and comparison was highlighted by many as a negative impact of the loss of engagement on monitoring, measuring and reporting. Several respondents also expressed concern at a loss of transparency as a result of withdrawal from the EU. Fears about loss of funding as a result of disengagement from the EU were also identified in comments.

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

- xviii. The most prevalent theme in comments was for the review to cover issues around transparency. There were suggestions that the review is also an opportunity for change. Many felt that all the topics currently covered in existing EU reporting and monitoring requirements should be retained.
- xix. Data interpreting and reporting were also noted as issues to review and several respondents discussed data gaps to address in any review of monitoring and reporting

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<sup>1</sup> Questions 5, 6, 8, 9, 12 and 13 were open-ended; asking for comments.

requirements. Current issues and/or problems with current reporting and monitoring requirements were also noted as issues to consider in the review.

- xx. Many highlighted a specific issue to include in any review of reporting and monitoring requirements.

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

- xxi. Over half (57%) selected 'yes', 7% selected 'no', 8% selected 'don't know' and 28% did not answer the question.
- xxii. The dominant theme in comments was a concern that governance issues will arise. Roughly half suggested the impact of a loss of scrutiny will be significant; the remainder identified governance issues but did not reference any magnitude of impact.
- xxiii. Key concerns included loss of legal or independent oversight, loss of supranational oversight and lower standards. Mitigating actions were described in many of these responses.

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

- xxiv. Many respondents expressed specific support for one or more options in the consultation paper. In comments they shared suggestions and reflections on the requirement for a new body or expanded roles of existing bodies.
- xxv. Another frequently shared view was of general support for the options, with discussion around how the government might meet the requirements; but no mention of a preferred option.
- xxvi. There was also general discussion on the skills and expertise required for effective scrutiny.

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

- xxvii. Many respondents agreed with the policy suggestions included in the consultation document. Almost all noted other specific policies for inclusion or made a general call for the inclusion of any or all policy areas relevant to the environment.
- xxviii. A few shared comments of a general nature, not specifying which policy areas they think should be included within the scope of scrutiny arrangements.

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

- xxix. Most comments contained examples or discussion of the negative impacts respondents believe are likely to occur due to the loss of EU complaint mechanisms; some identified multiple impacts. A very small number of respondents suggested the impact will be positive.
- xxx. Many discussed replacement or new arrangements or mechanisms to mitigate impacts from the loss of EU mechanisms.

**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?**

- xxxi. Over half (62%) selected 'yes', 2% selected 'no', 7% selected 'don't know' and 29% did not answer the question.
- xxxii. The most common theme in these responses was that a new function would be required to replace the current role of the European Commission. There was repeat discussion about the creation of a new function and suggestions as to the model of this function. A small number of respondents said they do not support the creation of a new function.

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

- xxxiii. Most respondents anticipated a negative impact from the loss of enforcement powers. This was typically based on the loss of the deterrent effect of EU enforcement, the potential for lowering or weakening of environmental standards and a view that the environment is likely to suffer as a result. Other negative impacts were identified by smaller numbers of participants. Several actions to mitigate the impact of the loss were suggested.
- xxxiv. Some respondents indicated there would be minimal or no impact; one felt the impact would be beneficial.

**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.**

- xxxv. The prevalent theme in responses was specific suggestions about what could be done to address the loss of EU enforcement. In this discussion there was frequent mention of the creation of an independent body or watchdog, with respondents suggesting a range of functions or powers being given to such a body.
- xxxvi. Several respondents suggested that an Environmental Court be established. There was also a number of general comments about new enforcement powers, and some comments and concerns raised around the need to work both with the rest of the UK and internationally.

**Conclusions**

- xxxvii. A range of informed stakeholders took part in the consultation. They were typically highly-engaged and knowledgeable about relevant matters, including legal issues, management of Scotland's resources, planning and delivering services, environmental matters, the development of policy and monitoring environmental change.
- xxxviii. Most of the Scottish Government's proposals were endorsed by respondents. However, given the breadth of views amongst respondents about priorities, areas of focus, the scope of the legal framework, calls for more detail, and the range of appetite in terms of ambition, it may be a challenge to develop a legislative solution that satisfies all interested audiences.

## 1. Introduction

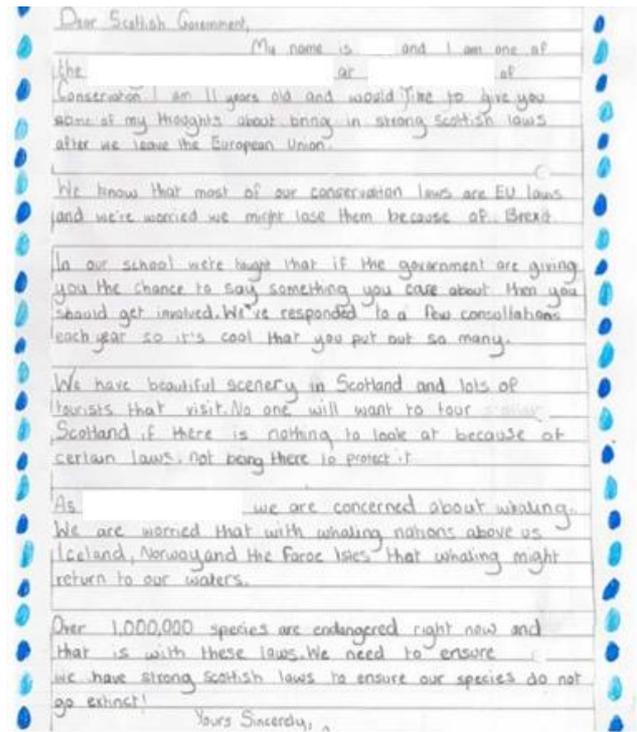
- 1.1 The Consultation on Environmental Principles and Governance in Scotland ran from the 16 February until 11 May 2019 and sought to gather views on how we maintain effective environmental governance following exit from the European Union. The consultation received 99 direct responses from a range of individuals and organisations. In addition to this, the consultation received 12,051 e-action responses as part of the campaign led by Scottish Environment LINK entitled, 'Fight for Scotland's Nature'.
- 1.2 The four EU principles guide policy making in the EU. EU environmental law is shaped by the four environmental principles and has a significant influence on domestic policy and legislation. EU membership has also provided a framework for monitoring, measuring and reporting on environmental outcomes, alongside the provision of scrutiny and enforcement at the supranational level.
- 1.3 Given the uncertainty about the future relationship between the United Kingdom (UK) and EU, the SG is taking a proactive approach to provide clarity for Scotland. As stated in the consultation, the Scottish Government has already made a commitment to maintain Scotland's distinctive approach to environmental protection and to maintain or exceed existing environmental standards.
- 1.4 Views gathered in the consultation will inform the development of future environmental governance arrangements based on careful systematic exploration of the evidence.
- 1.5 The consultation contained thirteen questions that covered the following themes:
  - The role of environmental principles in developing future policy and legislation
  - Maintaining effective, appropriate and proportionate environmental governance in Scotland

### ***Profile of respondents and engagement with the consultation***

- 1.6 In addition to the 12,051 e-action responses, the consultation received 99 direct consultation responses from 40 individuals and 59 organisations. The range of organisations that participated are shown below:
  - Twenty-four membership organisations such as; Scottish Environment LINK, RTPI Scotland and Oil and Gas Scotland
  - Twelve third sector organisations or campaign groups such as; Ullapool Sea Savers, Royal Society for the Protection of Birds and Keep Scotland Beautiful
  - Five local authorities including Scottish Borders Council and Aberdeen City Council
  - Five businesses such as; SSE Ltd. and Scottish Power
  - Three academic or research bodies such as the James Hutton Institute
  - Three Non-Departmental Public Bodies, including Historic Environment Scotland
  - Two public corporations
  - Two international membership organisations such as the Institute of Environmental Management and Assessment
  - One Commissioner and one Ombudsman.
- 1.7 Participants provided responses to the discussion through the online platform Citizen Space (76 responses) or by emailing or posting their responses to the Scottish Government (23 direct consultation responses plus 12,051 e-action responses).



A primary school submitted posters, letters and postcards in response to the consultation. These are examples from pupils in P2 and P5.



## Workshops

1.8 The Scottish Government ran three stakeholder workshops<sup>2</sup> during the consultation period. These provided another platform for stakeholders to share their views including those with day-to-day experience of existing regulatory regimes. Group discussions identified where there was a general consensus, mixed views and any areas of disagreement among different organisations and sectors. Where relevant, emerging themes and main views expressed in the workshops are referenced in this report.

## Approach to analysis and reporting<sup>3</sup>

1.9 Given the level of detail included in the responses it is only possible to provide a high-level summary of themes within this report. The report presents analysis of responses and findings as follows:

- Chapter 2 presents analysis relating to Environmental Principles (Q1-Q4)
- Chapter 3 presents analysis relating to monitoring, measuring and reporting (Q5, Q6)
- Chapter 4 presents analysis relating to scrutiny of performance (Q7, Q8, Q9)
- Chapter 5 presents analysis relating to considering complaints (Q10, Q11)
- Chapter 6 presents analysis relating to enforcing action (Q12, Q13)
- The final chapter contains conclusions and reflections for consideration.

1.10 Individual responses to the consultation, where permission for publication was granted, can be reviewed on the SG website<sup>4</sup>. We note this report should be read in conjunction

<sup>2</sup> Edinburgh (12 March 2019), Inverness (21 March 2019), and Perth (on 27 March 2019).

<sup>3</sup> More detail about the approach to analysis is available in Appendix 1.

<sup>4</sup> <https://consult.gov.scot/environment-forestry/environmental-principles-and-governance/>

with the consultation document, available online<sup>5</sup>. Appendix 2 provides a quantitative summary of responses and Appendix 16 lists the consultation questions.

### **Campaign response**

- 1.11 In addition to the 99 responses, the consultation received a total of 12,051 e-action responses as part of the campaign. The key points raised in the campaign responses are noted where relevant in this report.
- 1.12 The campaign to 'Fight for Scotland's Nature' was co-ordinated and promoted by 37 environmental charities in Scotland - members of Scottish Environment LINK - to gather support for a Scottish Environment Act. Members of the public were able to access standardised response wording (see below) and use this to submit an individual campaign response to the consultation.
- 1.13 10,380 of the campaign responses received used exactly the wording as outlined below, with a further 1,671 using this wording and personalising their response with additional comments.

Dear First Minister,

I don't want to see a roll-back of environmental protections in Scotland as a result of Brexit. With 1 in 11 species in Scotland at risk of extinction, Environment Secretary Roseanna Cunningham has rightly said that we cannot afford to 'turn back the clock' on environmental protections.

As your Advisory Group on Human Rights Leadership recommended, we need to protect our right to a healthy environment. To achieve that, we must safeguard and build on existing EU protections.

We therefore need a Scottish Environment Act that:

- embeds EU and international environmental principles in Scots law so that they can underpin all environmental decision-making.
- creates an independent and well-resourced watchdog to enforce environmental protections in the same way that the European Commission and Court of Justice do today.
- sets clear and ambitious targets for environmental protection alongside adequate financial resources.

I urge the Scottish Government to put forward a dedicated Environment Act that protects and enhances Scotland's nature, now and in the future.

Please treat this email as a response to the consultation Environmental Principles and Governance in Scotland. I'm responding as an individual and am happy for my response to be published without my name.

Yours sincerely,

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<sup>5</sup> See: <https://consult.gov.scot/environment-forestry/environmental-principles-and-governance/>

## 2. Environmental principles

- 2.1 Chapter 2 presents an analysis of responses to Questions 1, 2, 3 and 4 of the consultation which relate to environmental principles.
- 2.2 An intention to address the loss of legal force of the EU environmental principles is described in the consultation document. The SG propose to place a new legal duty on Scottish Ministers to have regard to the four EU environmental principles in the development of policies and legislation, noting *'this most closely matches the current effect of the principles on Scottish environmental policy and law'*.
- 2.3 For reference, the four principles are:
- the precautionary principle, preventing serious or irreversible environmental damage;
  - the principle of preventative action to avert environmental damage;
  - the principle that environmental damage should as a priority be rectified at source; and
  - the polluter pays principle.
- 2.4 Participants were invited to convey whether or not they agreed with the introduction of this duty by responding to the following question:

**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?*

- 2.5 In response to Question 1; 70% of respondents selected 'yes', 5% selected 'no', 1% selected 'don't know' and 24% did not answer the question.

### **Overall nature of response**

- 2.6 Three quarters of respondents (78 out of 99) provided explanatory comments alongside their yes/no/don't know answer to the consultation question.
- The most prevalent theme was expressions of support for the duty with mentions of specific concerns to be addressed. Key issues included the proposed wording of the duty and a belief that it should be strengthened. Others commented on the potential to be more ambitious, to incorporate additional principles in the duty, and on linking the duty to a wider environment strategy.
  - Another major theme in comments was straightforward explanations of why the respondent supported the proposal, with most citing the value of the duty in protecting Scotland's environment and in maintaining continuity and consistency with the current EU principles.
  - A few respondents did not support the proposal, primarily because they wanted to see something more ambitious and / or different to the current EU approach.

### **Issue with current wording / alternative wording suggestion**

- 2.7 A large number of respondents commented on the proposed wording of the duty. Most of these suggested that the phrasing to 'have regard to' the principles could be strengthened.

- A major theme included suggestions that the wording should continue to replicate Article 191 of the Treaty on the Functioning of the European Union (TFEU) which states policy 'shall be based on' the four principles.
- Others suggested phrasing including: 'to act in accordance with', 'ensure the application of', 'to further the principles', 'to comply with', 'acting in a way that is consistent with', 'seek to further', 'ensure the application of', 'to ensure respect for', 'be based on' the principles.
- A small number of respondents mentioned the House of Lords Select Committee inquiry into the Natural Environment and Rural Communities Act 2006 which, when referring to England's biodiversity duty, concluded that: *'The government should consider changes to the wording of the duty, as the requirement to 'have regard' for biodiversity is weak, unenforceable and lacks clear meaning'* or cited the House of Commons Environment Audit Committee which analysed the draft UK Environment Bill and called for the proposed duty to 'have regard to' various environmental principles 'not fit for purpose'.

2.8 Singular views on suggested wording are provided in Appendix 3.

### ***Why the duty has value***

2.9 Another major theme in comments was of the value of the proposed duty. A key thread in this discussion was about the importance of the duty in ensuring the continuity or consistency of standards and legislation with those currently in place to protect the environment. Singular viewpoints under this theme are presented in Appendix 3.

### ***How a duty may relate to a wider environment strategy***

2.10 Many respondents reflected on the duty in relation to Scotland's wider environment strategy. A common strand in this discussion included suggestions that consideration should be given to the introduction of primary legislation, an Environment Bill or Act, which would enshrine the principles in law. The need for a dedicated Environment Act was also a key ask in the campaign response. Within these responses there were comments on the following themes.

- That any Bill or Act should also include a requirement to produce and update an overall Environment Strategy which sets clear objectives, targets and indicators
- Supplementing the duty with an explicit overall commitment to achieving and maintaining a high level of environmental protection, which would highlight the overall goal and cover any gaps resulting from the application of the principles
- Setting of clear targets for environmental protection
- The campaign response called for 'clear and ambitious targets for environmental protection'.

2.11 Other examples of comments on the duty in relation to a wider environment strategy are set out in Appendix 3.

### ***Reference to other principles***

2.12 There were reoccurring suggestions that other principles beyond the four EU environmental principles should be included in the duty. These comments are summarised in more detail in paragraph 2.42 alongside other responses to Question 3 of the consultation, which focussed on the principles.

### **Implementation and enforcement**

- 2.13 Several respondents reflected on how the duty should be implemented and enforced. Whilst this is discussed elsewhere in the consultation, the comments provided on this theme in response to Question 1 are included in Appendix 3 for completeness.

### **An opportunity for ambition**

- 2.14 Within their comments some respondents highlighted the introduction of a duty as an opportunity to show ambition; the range of views is provided in Appendix 3.

### **Intra-UK considerations**

- 2.15 A small number of respondents highlighted the need to consider the positions of the UK and other devolved governments, both to ensure consistency when dealing with environmental matters and due to the borderless nature of some environmental issues. Similar themes were raised in response to Question 3 which covered the potential for additional principles to be included in the duty. The UK Government's Draft Environmental Bill was mentioned repeatedly in this context, with the need for consistency of principles across jurisdictions noted by a few respondents. One noted that if consensus cannot be agreed across governments in the UK then cross-border principles may be needed.
- 2.16 In response to Question 4 – the requirement for a policy statement to guide the interpretation and application of a duty – a small number of respondents mentioned intra-UK considerations. A few suggested that consideration should be given to how to ensure Scotland's approach is consistent, integrated and co-ordinated with the rest of the UK. One respondent mentioned the need for the policy statement to deal with any divergence between Scotland, the UK and the EU. Another described the legal frameworks which will need to be in place across the UK.

### **Workshops**

- 2.17 Themes in the discussions at SG consultation workshops echoed the points described above. Most participants agreed there should be a legal duty on Scottish Ministers in relation to the four EU principles. Many voiced a concern that the phrase 'have regard to' was not strong enough; whilst some alternatives were suggested, there was no clear preference for a specific form of words. Some called for consideration of the practical implementation of 'have regard to' or different expressions.

### **A sample of illustrative quotes that typify the themes identified in this section:**

“

*Underpinning the duty in this way will ensure that Scotland retains and ideally enhances the environmental protection and standards that have been achieved from being part of Europe. (Scottish Seabird Centre)*

“

*In my view a duty 'to have regard to' is a very weak duty. I appreciate that there are competing concerns and obligations that have to be satisfied, but Article 191(2) provides that policy 'shall be based on' the four principles set out after that. Why should the policy of the Scottish Government be any less than that? I believe that a stronger form of wording than a 'duty to have regard to' ought to be adopted. (Individual)*

## Responses to Question 2: Extending to other functions

- 2.18 The consultation document notes a duty could be extended *'to actions such as individual funding decisions and regulatory permissions. An explicit duty of this type would go beyond the current application of the EU environmental principles, which generally impact at the level of policy and the design of legislation'*. It identifies benefits from this approach and complexities that could arise if an extension was pursued.
- 2.19 Participants were invited to express views on the extension of the proposed duty by responding to the following question:

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

- 2.20 In response to Question 2; 21% selected 'yes', 38% selected 'no', 26% selected 'don't know' and 14% did not answer the question.

### **Overall nature of response**

- 2.21 Seventy-two respondents provided a substantive response that outlined the reasons for their agreement or disagreement with the consultation question.
- Across the detailed responses to this question there were a number of different perspectives on where the duty should extend and why.
  - The dominant theme in comments was expressions of disagreement. In almost all cases this was due to a belief that the duty should be extended, either to all functions exercised by Scottish Ministers and public authorities or to specific named organisations, with some providing examples of where this has been the case in other situations. This group often acknowledged potential for confusion or conflict but did not consider this a justification for not extending the duty.
  - A smaller number of respondents described their support for the proposal. Most highlighted the potential for confusion or conflict with other duties or responsibilities if the duty was extended beyond the remit proposed in the consultation.

### **Extending the duty to all other functions exercised by Scottish Ministers and public authorities in Scotland**

- 2.22 Prevalent themes in these discussions included a preference for the duty to be extended beyond the proposals, to all the functions exercised by Scottish Ministers and public authorities. Many stated the need for the duty to be extended to all levels of decision-making which have an impact on the environment. Some suggested that Scotland should adopt the approach which is currently in place under TFEU whereby all institutions of the EU and all their functions are included.

### **Potential for confusion / conflicts in decision-making**

- 2.23 Another common theme in comments about extension of the duty included discussion of potential for confusion and conflict in decision-making. For some, this was a reason for agreeing that the duty should not be extended. Others felt this was a reason to extend it. The different viewpoints are discussed below.
- 2.24 Those who agreed the duty should not be extended suggested:

- Doing so may cause complications or confusion due to overlap with other policies or duties
- It could make decision-making more time consuming or complex
- There would be a need to review the range of environmental duties currently in place in Scotland to ensure consistency
- A preference for applying the principles at a high level and allowing them to cascade down as appropriate rather than applying to all functions.

2.25 Among those who believed that the duty should be extended:

- there was acknowledgement there may be confusion or that there could potentially be conflicts of interest;
- some suggested ways in which duties could be reviewed, or conflicts mitigated;
- one noted that conflicts already exist under the current situation; and
- another highlighted the need for a policy statement to determine interpretation of the duty in a way which does not cause conflicts.

### ***Impact on local authorities***

2.26 Discussion of local authorities and whether this level of decision-making should be included in any extension of the duty was a recurring theme in comments. Some of this included mention of the potential for conflict or confusion discussed above.

2.27 Arguments for extending the duty to local authorities included their role in policy development, authority on environmental matters and potential to affect the environment through planning.

2.28 As noted previously, a small number of respondents reflected on the potential for conflicts or confusion, or the additional burden that would be placed on local authorities to 'have regard to' the duty. Conversely, another argued that direct application of the duty could undermine local democracy and distinctive local considerations.

2.29 A few identified ways in which local authorities are already following some of these principles, for example the duty to conserve biodiversity. Others highlighted resource implications for local authorities and urged the SG to allocate adequate resources. One suggested that if local authorities are not required to conform then they should at least be advised not to conflict with it; another gave a more detailed response which discussed oversight and auditing processes within local councils.

### ***Examples from elsewhere***

2.30 Several respondents cited examples from elsewhere for the SG to consider. These are detailed in Appendix 4.

### ***Extending the duty to other organisations / specific named agencies***

2.31 Another theme in comments included suggestions that the duty should extend to other types of organisation or specific agencies. Some stated that it should be extended more widely than proposed but did not define this further. Specific examples included: SNH, SEPA, Scottish Water, Forestry and Land Scotland, the Water Industry Commissioner for Scotland, Courts, private developers, infrastructure providers, and contractors.

### **General comments on the extension of the duty**

- 2.32 In other comments on the extension of a duty, a few respondents highlighted the need to ensure that the proposed approach ensures the current approach in Scotland is not eroded or lessened by leaving the EU. There were some general comments about the need to safeguard the environment and a small number highlighted specific areas of interest to them. One respondent made a general comment about the wider context: *'If regard for environmental principles and outcomes is properly embedded in the National Performance Framework and in relevant sectoral policies, then a wider duty may be unnecessary, and simplicity would argue for it not to be imposed.'*

### **Other themes in responses**

- 2.33 Issues with other elements of the wording or suggested alternatives to what is proposed were also identified in comments. A few respondents asked for clarification on the definition of 'policy' and suggested that this should include strategies and programmes; another asked for a better explanation to justify why the duty should not be extended.
- 2.34 A small number of respondents commented on enforcement including: calls for the duty to apply to the formation or implementation of policy or law, for compliance to be mandatory, that if local authorities are not required to conform then they should at least be advised not to conflict with it, and a suggestion that the audit process could be used to assess local authority environmental responsibilities.
- 2.35 There were also calls from a small number of participants for more detailed guidance: some felt the proposed policy statement should explain how to determine whether a policy or decision might impact the environment, others that there should be post-legislative guidance to inform the implementation of duties.
- 2.36 Other general comments made in relation to Question 2 are presented in Appendix 4.

### **Workshops**

- 2.37 In the consultation workshops held by the SG there were also mixed views on the duty being extended. Most asked for further clarity on how the duty would work and there were different views on which bodies, policy and law it should apply to and discussion about the challenges this might pose for policy makers and public authorities.

### **A sample of illustrative quotes that typify the themes identified in this section:**

“ We do not agree with the consultation paper's conclusion that this would go beyond what is currently required by EU legislation, and we consider that extending these functions to all Scottish Ministers and across public authorities will mean that there is a consistent and common framework for consideration of environmental issues throughout. (Open Seas)

“ Yes. Restricting the duty to Scottish Ministers is important because, if the duty were extended to other public authorities, decision making could become increasingly complex, as a wider range of decisions had to account for the four principles. This would potentially make the regulatory landscape less predictable for businesses, which would be highly negative. (National Farmers Union Scotland)

### Responses to Question 3: The focus of a new duty

- 2.38 The consultation document notes an intention to include the four EU environmental principles in the proposed duty. It explains that other environmental principles could also be considered for incorporation, noting some of the potential advantages and disadvantages of this approach.
- 2.39 Participants were invited to express views on the intention to focus on four key principles within proposed duty by responding to the following question:

**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?*

- 2.40 In response to Question 3; 41% selected 'yes', 28% selected 'no', 3% selected 'don't know' and 27% (18 out of 99) did not answer the question.

#### **Overall nature of response**

- 2.41 Seventy respondents provided explanatory comments alongside their yes/no/don't know answer. Across the detailed responses to this question there were a range of perspectives which differed depending on the interpretation of the question, with around half agreeing and half disagreeing.
- Roughly half of the respondents indicated agreement with the inclusion of the four principles but most of these indicated that other principles should also be included.
  - Just under half of respondents indicated they did not support the proposal. Again, this was due to a belief that additional principles should be included. Some suggested an alternative approach, described below.
- 2.42 Responses to Question 3 varied by type of respondent. Individuals were more likely to answer 'yes' (65% - 26 out of 40) than organisations (25% - 15 out of 59). Comments from local authorities and businesses tended to discuss the general point of additional principles being included, with specific principles more likely to be highlighted by third sector or campaigning organisations and membership organisations.
- 2.43 In addition to naming specific principles they would like to see included, many respondents also referenced those already in place or proposed, such as the EU Withdrawal Bill and the UK Environmental Bill. As both of these include rights from the Aarhus Convention (AC) the result is overlap in the discussions between principles and rights and the legislation and duties referred to. The campaign response referred to the need to embed 'EU and international principles' in Scots law but did not explicitly state which principles should be included.

#### **Other principles**

##### **Sustainable development**

- 2.44 The prevalent theme across comments was a suggestion that a principle related to sustainable development should be included in the duty.
- 2.45 In this discussion many referenced this principle being included or proposed for inclusion in other legislation. They argued inclusion of this principle in the new duty would achieve consistency. A few respondents noted that this is already contained within Scottish legislation and others observed its inclusion in other UK / devolved legislation.

- 2.46 A small number called for clarity on what the sustainable development principle means and how it is applied, one felt it should be included but in a legal framework such as an overarching policy aim (rather than as a principle in the duty).

### **Integration**

- 2.47 Another key theme in responses was a suggestion the integration principle should be included in the duty. A few respondents referenced this principle being included or proposed for inclusion in other UK legislation (UK Government's draft Environment Bill) and therefore argued for its inclusion in this duty for consistency. One felt it should not need to be included as a principle if the same effect is achieved by having an otherwise effective duty.

### **Non-regression**

- 2.48 Several cited non-regression as principle which could or should be included in the duty. Almost all of this discussion related to its potential to maintain the existing levels of protection, or that it should be included if Scotland is to be seen as a world leader. Individual views on this theme are presented in Appendix 5.

### **Keeping pace**

- 2.49 Many respondents called for the principle of keeping pace with the EU; some of these also suggested the inclusion of non-regression principle noted above. Comments on why this should be considered included the need to ensure that Scotland keeps pace with changing European and international standards. A small number noted that keeping pace will make it easier for Scotland to transition back into the EU.

### **Additional principles**

- 2.50 Over half of the respondents mentioned other principles which they believe merit consideration. A number of these comments related to the additional 5 principles that are included in the EU Withdrawal Act and the UK Environmental Bill. In addition to the principles mentioned above, these include the AC rights on access to justice in environmental matters, public access to environmental issues and participation in environmental decision making.
- 2.51 Many referred to the principles in the UK Government's Draft Environmental Bill. A few respondents referred to Section 16 of the EU Withdrawal Act 2018. Some recommend all principles listed in this should be included in the duty. A small number called for the inclusion of a duty to have 'high level of protection for the environment' or 'highest international standards' or similar. There were several general comments that more principles should be included, and that the duty should not necessarily be restricted to the four EU principles.
- 2.52 Comments on a range of other individual principles are presented in Appendix 5.

### **Human Rights**

- 2.53 A large number mentioned human rights in their comments. Several argued for the inclusion of the 'right to a clean and healthy environment' as recommended by the First Minister's Advisory Group on Human Rights Leadership. The campaign response also referenced the recommendation of the Advisory Group

- 2.54 A reoccurring theme within this strand of discussion included mention of human rights in the context of the AC. Some respondents commented on the links between environmental principles and human rights and the need to clarify or include these in legislation. A few commented on the development of the Human Rights Framework for Scotland; others shared general comments on human rights and / or human rights law.

### ***The Aarhus Convention***

- 2.55 Several respondents explicitly mentioned the Aarhus Convention; others reflected on the rights conferred on citizens by AC but did not directly name AC in their response.
- 2.56 Themes in these comments included reflections on whether or not the duty should include the rights noted under the AC; or if the duty could align to these. There was also some mention that these should be seen as rights not principles; a few supported the SG in not recognising these as principles; another felt the SG should make this distinction clear.
- 2.57 A small number suggested that the AC is generally interpreted in Scotland as the minimum requirement for citizens to raise issues. One respondent argued that as rights they should be established in primary legislation.

### ***Intra-UK considerations***

- 2.58 A number of respondents discussed the need to consider actions taken by the UK (particularly in relation to the UK Government's Draft Environmental Bill) and / or other devolved governments to ensure consistency where possible in the principles being referred to. These comments have been summarised in Chapter 2.

### ***International considerations***

- 2.59 A few respondents commented on international considerations, with a range of singular responses covering the need to implement the highest standards regardless of whether they are from the EU, UK or international, and the role of international human rights law.

### ***Other suggested approaches***

- 2.60 Alternative approaches to that outlined in the consultation document were also identified in responses.
- 2.61 Among those who agreed with the question, other suggestions included:
- The need for a legally binding overarching environmental objective
  - A duty on public and private organisations to publish an annual statement on environment and climate change impact to reinforce 'polluter pays' principle
  - A review of international environmental principles to understand how they already apply to Scotland
  - A duty to publish an environmental strategy
  - An aim to restore and enhance damaged areas as well as giving protection
  - The need to link the duty to clear goals for policy and implementation and to a performance framework which allows these to be assessed.
- 2.62 Among those who disagreed with the question, suggestions included:
- To move away from EU principles and to create new, UK based principles. One respondent argued that the principles need to be designed to support agriculture

and be workable in the UK, commenting on the need for balance between allowing businesses to function effectively whilst protecting the environment.

- Another called for a mechanism in the legislation to allow additional principles in the future without the need for primary legislation.
- One highlighted a need for a framework to establish how the wider public interest is represented in decision making in order to show how the principles are realised in practice.

### ***Reiterating the value of the proposed approach of focussing on four principles***

- 2.63 Some respondents emphasised the value of the duty solely focussing on the four principles. Within this, a small number highlighted that using these principles ensures continuity with those currently in EU law or consistency with other obligations. A few felt that adding further principles could add complexity and slow down the process, with another respondent also stating this has the ‘virtue of simplicity’. Some highlighted the value of using these principles as they have already been subject to judicial and academic discussion; one observed that the duty signals a commitment from SG and provides clarity.

### ***Workshops***

- 2.64 Some workshop participants also expressed a desire for additional principles. The non-regression principle and the integration principle were mentioned most often. There were suggestions that further consideration was needed on the overlap between the various principles. How the principles sit alongside the UN’s Sustainable Development Goals was also discussed. A small number of participants talked about the SG’s ongoing work to develop a human rights framework. This was not discussed in detail, but some felt that this could be helpful in achieving better environmental outcomes.

### ***A sample of illustrative quotes that typify the themes identified in this section:***

“ We note that the current UK Parliament draft Environment (Principles and Governance) Bill refers to ‘environmental principles’ as meaning the four principles set out under Q1, along with principles for sustainable development; integration of environmental protection requirements into policy and activity; public access to environmental information; public participation in environmental decision-making; access to justice in relation to environmental matters. Including these principles, as well as the principle of non-regression, would help ensure consistency of approach across the UK. (Anonymous)

“ The Scottish Government has a unique opportunity to strengthen its environmental legislation and policy beyond current the EU standards. This should involve the inclusion of more environmental principles including the ones listed in Background section. (Individual)

## Responses to Question 4: Associated requirement for a policy statement

- 2.65 The consultation document notes that any duty to have regard to the principles could be accompanied by a duty to produce a policy statement that sets out in detail how the principles should be used. It explains the function of policy statements and the potential advantages of this approach.
- 2.66 Participants were invited to convey whether or not they agreed with the proposal to supplement the principles with a policy statement by responding to the following question:

**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?*

- 2.67 In response to Question 4; 69% selected 'yes', 2% selected 'no', 4% selected 'don't know', 25% did not answer the question.

### **Overall nature of response**

- 2.68 Three quarters of participants - 76 out of 99 - provided explanatory comments alongside their yes/no/don't know answer to the consultation question.
- The dominant theme in comments was of expressions of agreement with the requirement for a policy statement.
  - Another major theme was of reflections on other areas for consideration. These included the process of developing the statement, the interplay between the statement and the duty and legislation, and suggested content of the statement.
  - A small number of respondents did not support the proposal, for individual reasons.

### **The role of the policy statement in providing guidance and consistency**

- 2.69 Over half of the respondents reflected on the role of the policy statement in providing guidance and consistency in the implementation of the duty or four principles.
- The dominant theme in comments concerned the importance of the statement in guiding implementation and application.
  - There were several comments on the importance of the statement in interpreting the principles, duty or legislation.
  - Some reflected on the importance of the statement in ensuring consistency.
  - There were also comments on the role of the policy statement in providing courts with guidance on how the legislation / principles should be interpreted.
  - Several noted the importance of the statement in improving understanding or ensuring standards are being effectively applied and that decisions can be monitored.

### **Development of the policy statement**

- 2.70 Views on how the policy statement should be developed were expressed by several respondents. Many argued for the statement to be subject to consultation in some form.
- The most prevalent theme in these comments was a request for the statement to be drafted in a collaborative process of consultation or engagement with stakeholders.
  - A small number suggested that the wording or formulation of the policy statement should be subject to a public consultation.

- 2.71 Many suggested ways in which the Scottish Parliament could be involved in the process.
- Some called for full parliamentary consultation or consideration of a final draft.
  - A few suggested the statement should be approved by the Scottish Parliament.
  - A small number highlighted the need for a requirement for Ministers to report on how they have incorporated Parliament's comments.
- 2.72 Several commented on the need to review the content of the statement at regular intervals; there were also suggestions that the process for developing the policy statement should be set out in statute.
- 2.73 Singular comments on policy statement development are provided in Appendix 6.

### ***Content of the policy statement***

- 2.74 Comments on the potential content of the policy statement were identified in numerous responses. These focussed mainly on how the duty and principles should be balanced alongside existing obligations, details for implementation and the potential to provide guidance on wider principles.
- 2.75 Discussion on how the application of the principles should be balanced alongside other areas/issues/duties included:
- A suggestion that the environmental principles should have equal weight to social and economic principles
  - Guidance on balancing the principles where more than one applies to a decision
  - To balance the principles with human rights
  - Comments on how they should apply in the event of a conflict with existing obligations or duties
  - Identification of priorities within the guidance i.e. areas where ministers are keen to make progress, and also to *'avoid the blanket adoption of overly complex assessment processes for relatively minor impacts'*.
- 2.76 Reflections on the details of implementation were found in a number of responses. Examples included the requirement for an implementation plan, the extent to which discretion can be exercised when applying the principles, a statement of policy on the principles or definitions of the principles, best practice examples of implementation, and calls for clear delivery mechanisms to be outlined.
- 2.77 A small number commented specifically on the language in the statement. For example, one felt it should be as strong as the current arrangements; another that it be *'written in a manner that makes it readable and relevant to those with the responsibility to apply the principles in their day-to-work.'*
- 2.78 Singular suggestions about the content, which often related to participants' individual views and areas of expertise, are provided in Appendix 6

### ***Links between the policy statement, duty and legislation***

- 2.79 Discussions about how the policy statement would work alongside the duty to have regard to the four principles and any associated legislation were identified in several responses.

- 2.80 Many of these argued that there should be a duty on Ministers or public bodies, or that they should have regard to the policy statement.
- 2.81 Some felt that the process for developing the statement should be set out in statute.
- 2.82 A few suggested that the legislation should include a requirement for Ministers to produce a policy statement. A small number argued that the guidance for the implementation of the duty should be established in statutory guidance or statute, not just in a policy statement.
- 2.83 There was also an infrequent suggestion that the legislation should only set out the high-level need or purpose of the policy statement, for example ‘to guide interpretation and application’ rather than the content of the statement, so it can be easily updated. One felt the duty to have regard to the principles should come into force immediately without necessarily waiting for the policy statement. Another suggested that the principles should be set out as specific commitments in future legislation.

***The interplay between the policy statement, courts and case law***

- 2.84 Many participants discussed how the policy statement could or should be used by the courts or how it is linked to case law.
- 2.85 In terms of the interplay with courts:
- as noted earlier, several commented on the role of the policy statement in providing courts with guidance on how the legislation / principles should be interpreted; and
  - a small number commented that the statement can / should be used by courts (to ensure a consistent approach).
- 2.86 In relation to case law:
- a small number of respondents shared straightforward comments on how the policy statement can supplement any existing case law, with one observing it needs to be updated as case law changes; and
  - a few commented on the influence of case law on the interpretation of principles and suggested that courts should continue to have the option to choose the extent to which they have regard to CJEU case law.
- 2.87 Singular suggestions about courts and case law are provided in Appendix 6

***Other potential roles for the policy statement (not directly related to providing guidance and interpretation)***

- 2.88 Several respondents observed the potential role of the policy statement beyond its intended purpose of providing guidance on the interpretation and application of a duty. These varied depending on the viewpoints of the individual respondents and included the role of the statement in being flexible enough to allow regular updates or changes over time as a result of the evolution of EU law; for example new or amended principles, international developments, or new research, evidence, or scientific knowledge.

***Other reasons for agreement***

- 2.89 In addition to the reasons summarised above, some respondents gave singular reasons as to why they agreed with the requirement for a policy statement. These included some

short straightforward responses, such as it is ‘logical’, or ‘helpful’. There were also suggestions it will help raise awareness and understanding of the duty among the public.

- 2.90 One commented that a policy statement is the appropriate level to tweak the operation of the duty, rather than in the legislation. Another suggested practical implementation of such a duty is vital. One felt that the public has a right to know how the money is being spent.

#### **Other responses to the question**

- 2.91 A small number of respondents mentioned intra-UK considerations which have been summarised in Chapter 2.
- 2.92 A few respondents argued for an independent body or watchdog to be set up.
- 2.93 Two were dismissive of the need for a policy statement: one due to it being linked to EU specifications and the other because they believe it would be irrelevant to anyone outside the civil service.

#### **Workshops**

- 2.94 There was strong support in the workshops for the production of a policy statement. Most felt the statement should: outline the policy outcome to be achieved from the application of the duty and, provide guidance on the interaction with existing duties and on how best to balance environmental outcomes with other policy needs.

#### **A sample of illustrative quotes that typify the themes identified in this section:**

“ *The policy statement should provide an explanation describing the purpose of each principle, how these are to be interpreted and applied, and some contextual ‘good practice’ examples of where the principles have been applied in the past, to help shape understanding amongst stakeholders. (RSPB)*

“ *Any such policy statement must be developed and adopted through a specified and transparent statutory process which includes meaningful consultation of and input from relevant stakeholders including civil society organisations. (Client Earth)*

“ *The statement should also provide guidance to courts in the interpretation of the principles and their application, should they be required to determine whether any future application has been appropriate. (WWF Scotland)*

### 3. Environmental governance arrangements: monitoring, measuring and reporting

- 3.1 Chapter 3 presents the analysis of responses to Questions 5 and 6 of the consultation, which relate to environmental governance arrangements and cover monitoring, measuring and reporting.
- 3.2 Environmental governance arrangements are highlighted in the consultation paper as a means to ensure effective implementation of policy relating to the environment and compliance with the law relating to the environment. Four key elements of governance are described, with acknowledgement of overlap and interaction. The first of these - monitoring, measuring and reporting activities - is discussed in this chapter.
- 3.3 The paper notes that EU membership has provided a framework for monitoring, measuring and reporting on environmental outcomes, supported by the sharing of information and the collation of consistent information within the EU. Many of the reporting requirements are statutory, with analysis and preparation of the reporting undertaken by EU institutions and data often aggregated at a member state level.
- 3.4 Consultation respondents were asked to provide their opinions on potential impacts on monitoring, measuring and reporting by responding to the following question:

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

#### **Overall nature of response**

- There were 91 responses to this question. Three respondents left comments to the effect of 'no comment' or 'I cannot answer this' in response to this question; leaving 88 substantive responses for analysis.
- Almost all of the comments described the impact of the loss of engagement with the EU on monitoring, measuring and reporting as negative.
- Some respondents believe there will be no impact, or that the impacts are unclear of the loss of engagement with the EU on monitoring, measuring and reporting.
- A small number believe the impact of the loss of engagement with the EU on monitoring, measuring and reporting will be positive.

#### **Reference to current arrangements**

- 3.5 The most common theme in the discussions was reflections on the value of current EU monitoring, measuring and reporting arrangements.
- 3.6 Most of these were detailed comments calling for current arrangements and requirements to continue post EU exit. There were also suggestions that Scotland should seek to retain membership of specific EU agencies such as the EEA.
- 3.7 Some respondents suggested that there should be continued international and EU coordination and cooperation in regard to monitoring, measuring and reporting arrangements and requirements, but did not refer to membership of specific agencies.
- 3.8 A small number shared general comments that post EU exit, there should be the same level of monitoring, measuring and reporting as currently exists.

### **Lower standards**

- 3.9 The second most prevalent theme in responses was concern that the loss of engagement with the EU on monitoring, measuring and reporting will result in generally lower standards. The concerns included:
- Harm to the environment due to lower standards of monitoring, measuring and reporting
  - A fear that lower standards will become the norm
  - Lack of scrutiny (discussed further in responses to question 7)
  - Weakened enforcement in relation to malpractice
  - That Scotland will fall behind in the application of environmental legislation.

### **Loss of knowledge, expertise, networks, collaboration, benchmarking or learning**

- 3.10 Another common theme in responses was reflections that loss of engagement with the EU could impact negatively on Scotland's ability to participate in networks and / or collaborative working. Discussions in this thread included suggestions that in the longer term this would hinder access to knowledge, expertise and learning.
- 3.11 Several respondents made general comments indicating concern about loss of knowledge, expertise, networks, collaboration, benchmarking or learning. Some respondents reiterated the importance of maintaining collaboration and contact with the EU and noted that consideration will need to be given to how to facilitate this. A small number of respondents discussed the loss of Scotland's ability to contribute to international efforts to address environmental problems.

### **Mitigation measures**

- 3.12 Many respondents suggested measures that could be implemented by the SG to mitigate negative impacts of the loss of engagement with the EU on monitoring, measuring and reporting. Within these comments there was a common thread of discussion that re-joining the EEA post EU exit would mitigate potential negative impacts of loss of EU engagement.
- 3.13 Some suggested the consideration of establishing a domestic governance mechanism/independent body to carry out the function of existing EU bodies and which considers long-term monitoring, trend analysis, data sharing and encourages a collaborative governance culture.
- 3.14 A small number of respondents called for continued participation in EU Framework Programmes for research, academic and or NGO networks. A few suggested the SG continue monitoring, measuring and reporting and then sharing data on a voluntary basis, without the need for new legislation or for retaining memberships.

### **Loss of data aggregation and comparison**

- 3.15 The loss of data aggregation and comparison was highlighted by many as a particularly negative impact of the loss of engagement on monitoring, measuring and reporting.
- 3.16 Much of this discussion included general remarks to the effect that '*EU exit will result in a loss or lack of data sharing, collection, comparison or measurement*'. Some expressed specific concern that access to EU-wide data will become restricted. A small number of

respondents identified a need for collaboration and joint working to ensure that, post EU exit the sharing and comparison of data can continue.

### ***Reduced transparency and accountability***

- 3.17 Several respondents expressed concern that there will be a loss of transparency as a result of a loss of engagement with the EU.

### ***International / cross-county considerations***

- 3.18 A small number of respondents discussed reporting and alignment with international treaties such as: OSPAR Convention, the Bern Convention, the Aarhus Convention, the Espoo Convention, the Convention on Long-range Transboundary Air Pollution. Another respondent commented that environmental issues are global and therefore data sharing should sit outside of European control. Two respondents discussed intra-UK considerations which are discussed in a more detailed section in Chapter 4.

### ***Specific examples***

- 3.19 Specific examples of impacts resulting from the loss of engagement with the EU on monitoring, measuring and reporting are provided in Appendix 7. A small number of respondents reflected on the illegality of disturbing protected species under EU law, and that if such a disturbance is recorded and a complaint has been made it can be taken to the EU Commission. They expressed concerns that this function will be lost post EU exit.

### ***Loss of funding***

- 3.20 Fears about loss of funding as a result of disengagement from the EU were also identified in comments. For example, a few respondents described uncertainty, post EU exit, around the amount of funding available for monitoring, measuring and reporting.

### ***References to the Roundtable on Environment and Climate Change***

- 3.21 Findings from the Roundtable were mentioned by some respondents in their response to Question 5. This was a panel of experts who were asked to consider potential gaps in environmental governance that may arise should the UK exit the EU. A few respondents noted they shared the Roundtable's concerns.

### ***Positive impacts***

- 3.22 A small number of respondents suggested that loss of engagement with the EU will have positive impacts. These comments highlighted less bureaucracy and greater freedom.

## **Responses to Question 6: Key issues for monitoring and reporting requirements**

- 3.23 The consultation paper notes the importance of providing clarity on the scope and purpose of environmental monitoring and reporting once the requirements of EU membership no longer apply. The Scottish Government proposes a review to rationalise current reporting and monitoring programmes, taking the opportunity to clarify and consolidate reporting requirements.
- 3.24 Respondents were asked to discuss the issues they would like to see included in a review by answering the following question:

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

- 3.25 This open-ended question achieved 86 responses. Of those, 81 left substantive comments (five left comments to the effect of 'no comment').

### ***Transparency***

- 3.26 The most prevalent theme in comments was for the review to cover issues around transparency. In this discussion many reflected on public data accessibility, noting it should be published to enhance democratic accountability for the environment.
- 3.27 Some respondents discussed the need for a transparent and consistent reporting system. A small number called for the creation of an independent watchdog to scrutinise the SG.

### ***Resources/costs/efficiency***

- 3.28 Another common theme in responses concerned resources, costs and efficiency as issues to be considered in the review. The need for adequate financial resources was also referenced in the campaign response.
- 3.29 Some respondents made general comments discussing the review as an opportunity to ensure requirements are well resourced, efficient and economically viable.
- 3.30 A few respondents identified the need for access to expertise and adequate resources to scrutinise reports. A small number called for a comprehensive assessment of ongoing and long-term costs to be included in the review, including how funding requirements will be assured.

### ***Upholding existing reporting and monitoring requirements***

- 3.31 Many respondents indicated that all the issues that are currently covered in existing EU reporting and monitoring requirements should be retained.

### ***Data interpreting and reporting***

- 3.32 Data interpreting and reporting were also noted as issues to review. In this discussion a small number of respondents suggested that data monitoring and reporting should be consistent across the UK and EU where possible, with an alignment of reporting requirements to avoid a duplication of requests, which can lead to variations in data reporting. A few left general comments indicating the need for the review to consider data comparability.
- 3.33 A small number called for a new, simplified system of monitoring and reporting with one noting that specifically councils would benefit from simplified reporting.

### ***Data gaps***

- 3.34 Several respondents discussed data gaps as an issue to cover in a review of monitoring and reporting requirements. Within this discussion, a small number called on the review to identify gaps in existing monitoring, indicating that current data recording is lacking.

### ***Evidence to inform the review***

- 3.35 Several respondents noted evidence that could inform the review and, in some cases, signposted the SG to specific material including existing reports, reviews and evidence to consider. Examples include the SBIF review in relation to transforming Scotland's biological infrastructure when reviewing monitoring and reporting.

### ***Alignment with other monitoring frameworks***

- 3.36 Many respondents called for the review to consider structuring requirements in accordance with other monitoring frameworks. Several specified that they would like to see requirements aligned with other UK jurisdictions, EU requirements and working in collaboration with the EEA.

### ***Issues with current reporting and monitoring***

- 3.37 Current issues and/or problems with current reporting and monitoring requirements were also noted as issues to consider in the review. Some respondents made the point that Scotland has been ineffective so far in terms of monitoring compliance under the EU framework and that the review presents an opportunity to improve regulations. A small number discussed the review as an opportunity to refocus monitoring and reporting requirements on Scotland as some issues will be unique to Scotland.

### ***Data quality***

- 3.38 A small number of respondents explicitly mentioned data quality as an issue that should be covered in a review of monitoring and reporting. These included suggestions that the review should consider time and other pressures that may affect the volume of data that can be collected, impacting its quality.

### ***Data sharing***

- 3.39 Some respondents discussed data sharing as an issue that should be covered in a review of monitoring and reporting. Points raised in this discussion include the need to continue data sharing between jurisdictions post EU exit, and that there should be no legal issues with this sharing.

### ***Other***

- 3.40 A few organisations offered to contribute to the review and a small number of respondents gave comments which focussed on intra-UK considerations. These are discussed in more detail in Chapter 4.

### ***Specific issues to include in the review***

- 3.41 Several respondents highlighted a specific key issue they would like to see covered in a review of reporting and monitoring requirements. A small number provided an identical list of environmental topics to include in the review:
- Biodiversity: species abundance/distribution, etc
  - Representativeness, condition and connectivity of protected areas

- INNS
- Air, water, marine quality standards, light pollution, etc.
- Waste
- Chemicals
- Procedural comparisons: e.g. SEA, EIA, access to justice, etc.

3.42 A few would like a review to cover the role of citizen science as a basis for engaging with the public on the impact of climate change and sustainability.

### **Workshops**

3.43 Workshop participants were strongly supportive of a review of environmental monitoring which includes identifying gaps in reporting, establishing best practice and promoting innovation in data collection and reporting in Scotland. A number highlighted that it would be helpful to set out the benefits of monitoring and reporting and a number also stressed the importance of ensuring the relevant requirements are cost effective. An additional point not covered elsewhere in consultation responses was considering and developing evidence to support Scotland continuing to be involved with the European Environment Agency post withdrawal.

### **A sample of illustrative quotes that typify the themes identified in this section:**

“ *This loss, if unabated, will lead to reduced and less effective implementation of environmental laws with the result that our natural world suffers. Monitoring, measuring and reporting are all crucial for establishing how well environmental law is being implemented. These processes allow identification of areas that require improvement and potentially further investigation. They also help us to understand how the environment itself is fairing. Without a clear and detailed picture of the status of the environment, it is impossible to develop meaningful and effective law and policy designed to protect it. (Client Earth)*

“ *In that respect, it is crucial that in dealing with complex, long problems we do not sacrifice multi-decadal monitoring systems for short-term public expenditure savings, and that we maintain our ability to contribute effectively to pan-European macro monitoring and long-term trend analysis. Review must consider the need for clear long-term targets that are set and do not change with any shifts in government as well as long-term commitment in the form of funding; at the same time, review should consider the outcomes of the upcoming EU fitness check review. Monitoring requires resource, so consideration must also be given to capacity and costs; review should include identifying current gaps in and costs of monitoring. (Department for Social Responsibility and Sustainability, University of Edinburgh)*

## 4. Environmental governance arrangements: performance

- 4.1 Chapter 4 presents the analysis of responses to Questions 7, 8 and 9 of the consultation which focus on the scrutiny of performance as part of governance.
- 4.2 Scrutiny of government performance and the extent to which environmental objectives are being achieved is the second of four areas of environmental governance arrangements outlined in the consultation paper. The paper notes that once UK withdrawal from the EU is complete, the scrutiny role of the Scottish Parliament and other public bodies will continue but there will be no oversight from the European Commission or its agencies.
- 4.3 Respondents were asked to identify any governance issues relating to the loss of EU oversight by responding to the question:

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

- 4.4 In response to Question 7; 57% selected 'yes', 7% selected 'no', 8% selected 'don't know' and 28% did not answer the question.

### **Overall nature of response**

- Seventy-nine respondents left comments in addition to their yes/no/don't know response.
- The dominant theme in responses was of concern that governance issues will arise. Roughly half of these comments suggested the impacts will be significant; the remainder identified governance issues but did not reference any magnitude of impact. Mitigating actions were described in many of these responses.
- Some respondents made general comments but did not identify governance issues.
- One respondent indicated they expected no governance issues to arise.

### **Loss of legal oversight**

- 4.5 Loss of legal oversight was the most commonly identified governance issue. Some attributed this to loss of a formal governance structure to carry out the functions of scrutiny and assessment; one highlighted the loss of in-court functions as an issue.

### **Loss of supranational oversight**

- 4.6 The second most common theme was the loss of supranational oversight as a significant governance issue. Comments on this theme included: the need to hold the SG and the UKG to account, a governance gap, comparisons of performance with other nations, transferring information, and ensuring that international commitments and obligations are implemented. Loss of oversight resulting in poorer quality of monitoring and enforcement was also identified; one highlighted that no existing body in the UK could replace this oversight.
- 4.7 A small number of respondents mentioned loss of inter-jurisdictional comparisons. One also mentioned the loss of trans-national oversight in the European Court of Justice (ECJ) as a significant impact. There were discussions of the loss of both soft power, for example developing legislation or guidance, and hard power stemming from the ECJ. It

was also suggested that loss of legal oversight could result in politicisation of environmental issues and be damaging in the longer term.

#### ***Lowering of standards/breaking of rules***

- 4.8 Another thread in responses was concern about a general lowering of standards. Respondents felt the loss could cause environmental performance to fall, rendering the SG aim of maintaining EU standards unachievable. A few indicated that loss of EU scrutiny and assessment could result in a higher breach of rules, with one suggesting this could lead to regression in Scotland.
- 4.9 There were also small numbers of comments on the loss of capacity and expertise resulting in a lack of comparability and lower standards generally.
- 4.10 A few respondents discussed pollution and suggested that if agencies are not held to account, incidents may increase. The general weakening of environmental protection without the EU was also raised. In this discussion one respondent highlighted that Scotland is an important geographical migration location, and so planning for resilience to population management could be impacted without EU assessment and collaboration.

#### ***Loss of independent oversight***

- 4.11 Several respondents described the loss of independent oversight as significant. Issues raised included loss of credibility and impartiality, loss of asset-management, less objectivity and fairness, loss of accountability, loss of transparency, incentivising action and environmental harm as a result of loss of protection. It was suggested that without clear independence, control of the environment could shift towards those who prioritise private and profit related interests.

#### ***Calls for an independent oversight body***

- 4.12 Many respondents called for the formation of an independent oversight body to mitigate governance issues. Detail can be found in Chapter 6 where this is covered more extensively.
- 4.13 A small number of respondents expressed support for the creation of a Scottish Environment Protection duty to replace EU policy, with one adding that oversight should be provided by an empowered regulator. Some expressed concern that existing bodies in Scotland do not have the resources to replicate the role of EU scrutiny and assessment. They indicated that any new independent body must be adequately resourced.
- 4.14 A few respondents suggested that existing bodies (Parliament, Audit Scotland, SEPA, SPSO) should attain additional powers to fulfil the function of scrutiny and assessment. Others discussed the need to replace the various forms of EU scrutiny with different or complementary mechanisms, without specifying what form that would take.

#### ***Resource gap***

- 4.15 Another theme in responses included the potential resource gap resulting from the loss of EU scrutiny and assessment. In this discussion some respondents reflected on lack of capacity and expertise as a cause for concern. For example, one discussed the need for more environmental expertise in order to increase the resource available in Scotland, another felt local authorities have a particular resourcing issue due to limited expertise.

- 4.16 A few respondents suggested existing bodies in Scotland lack the resources or capacity to carry out the functions of the EU oversight institutions.

***Intra-UK considerations***

- 4.17 Across Question 5 to Question 8 and additionally at Question 12 and Question 13, a small number of respondents discussed a need for the Scottish Government to consider intra-UK working when dealing with environmental governance. These comments often highlighted collaboration and joint working across UK administrations and borders to ensure consistent and co-ordinated approaches to the four aspects of governance outlined in the consultation paper.
- 4.18 There was also some discussion around the formation of a new body. Details around these comments can be found in Chapter 6.
- 4.19 Similar views were expressed in the workshops held by the SG. There was broad support for governance structures that fit existing routes of accountability in Scotland, and questions about how governance structures across the UK will align. Some expressed concern that there might be gaps if the structures were not coordinated. In the discussion it was suggested different administrations could work together to share resources and consider environmental issues that impact across the UK.

***Positive impact***

- 4.20 Some respondents suggested the loss of EU scrutiny and governance could be positive for Scotland. In this discussion a small number indicated that EU exit would provide Scotland with an opportunity to simplify scrutiny and assessment processes.

## Responses to Question 8: How to meet requirements for effective scrutiny

- 4.21 The consultation paper discusses the Scottish Government’s wish to support the Scottish Parliament’s scrutiny role by establishing an approach which:
- helps Scotland to maintain or exceed existing environmental standards and to comply with international environmental obligations;
  - fits Scottish circumstances and established methods of accountability;
  - is fair, open and transparent;
  - respects the devolution settlement; and
  - is effective and proportionate in delivering strong environmental protection.
- 4.22 A number of options are suggested in the paper. These include combining existing and new mechanisms, including continuing scrutiny by civil society, expanding the role of existing public bodies, establishing an independent supervisory panel in the short to medium term and creating a new independent body in the long term. A need for future arrangements to have access to specialist expertise and skills, independence from government and adequate powers were also highlighted.
- 4.23 Respondents’ views were sought on whether any additional functions might be required to support effective scrutiny, how these should be delivered and with what powers:

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

### **Overall nature of response**

- There were 87 responses to Question 8. Two respondents left comments the effect of ‘no comment’ or ‘I cannot answer this’, leaving 85 substantive responses for analysis.
- The most common theme in responses was expressions of specific support for one or more of the options detailed in the consultation paper. These frequently included suggestions as to what those might be; for example; creating a new body or expanding the roles of existing bodies.
- The second most frequently shared view was of general support for options and a discussion around how the government might meet the requirements; but no mention of a preferred option.

### **New body**

- 4.24 Over half of the direct consultation responses indicated support for the creation of a new body to meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland. In addition, the campaign response called for *‘an independent and well-resourced watchdog to enforce environmental protections in the same way that the European Commission and Court of Justice do today’*.
- 4.25 Respondents’ comments on the powers, functions, resources and form needed to fulfil a scrutiny role have been summarised in Chapter 6.
- 4.26 Whilst calls for a new independent body or watchdog were spread relatively representatively across consultation respondents, the majority of calls for an independent body, environmental court or tribunal came from organisations.

### ***Expanding the role of existing bodies***

- 4.27 The most common theme in responses concerned the possibility of expanding the role of existing bodies to meet the requirements for effective scrutiny of government performance. This was mentioned either as preferred option for the government to consider, or as part of a discussion about the possible options.
- 4.28 Some participants discussed why expanding remits of existing bodies would not be a sufficient method of reaching the requirements for effective scrutiny. For example, some felt that existing bodies would not be entirely independent from government; another suggested that an ombudsman cannot fulfil the requirements and one observed that bodies can be subject to funding cuts and listed potential limitations.
- 4.29 A small number suggested Audit Scotland's remit could be expanded, with the Public Audit and Post Legislative Committee (PAPLS) and the Scottish Parliament's remit being widened to oversee this role. These respondents went further to discuss powers, suggesting that Audit Scotland and the PAPLS Committee should be empowered to report on whether sufficient resources have been allocated to the different parts of government and its agencies for the delivery of environmental policies.
- 4.30 A few discussed the work being undertaken by DEFRA and the creation of the Office for Environmental Protection by the UKG; one observed that the SG could consider allowing this role to extend to Scotland. It was also noted that the new body as proposed by the UK Government may not provide adequate independence from government and that it is unlikely that a deal between the two jurisdictions would be reached in the near term.
- 4.31 Other discussions included expanding the role of the Information Commissioners Office as they are already involved in environmental governance through ensuring compliance with the Aarhus convention. Expanding the scope of bodies such as; SEPA, SNH, Audit Scotland, SPSO so they share the role of providing effective scrutiny was also suggested.

### ***Skills and expertise for scrutiny***

- 4.32 Many respondents reflected on the skills and expertise needed to meet requirements for effective scrutiny. In these discussions there were frequent suggestions that access to expertise is a high priority in carrying out effective scrutiny. For example, *'it is essential that adequate expertise is put in place to enable full independent scrutiny to be carried out'*. Examples of expertise included legal matters, technical knowledge, and understanding of local issues. One respondent suggested that a new body should have the capacity to commission external expertise; another felt equipping an existing body with the adequate level of expertise would be a strain on resources.
- 4.33 A small number left brief general comments suggesting that any new body should have the relevant expertise; some suggested that expertise could be provided through expanding the role of an existing body but did not specify which one.

### ***A supervisory panel***

- 4.34 The establishment of a supervisory panel to meet the requirements for effective scrutiny was also discussed by some respondents. A small number of these explicitly suggest that parliament could not undertake this role, for example noting existing committees already have stretched resources.

## ***Workshops***

- 4.35 Workshop participants broadly supported an independent scrutiny function which was self-directing, open, transparent and independent from government. Many felt that the Scottish Parliament is not currently designed or structured to replace the full scope of scrutiny currently undertaken by the EU. Unlike some in the wider consultation there was little enthusiasm for an Office of Environmental Protection for Scotland, given the potential lack of independence from the UK Government.

## Responses to Question 9: Policy areas for inclusion within the scope of scrutiny arrangements

- 4.36 The consultation paper notes the challenges in defining the scope of environmental policy, but states that it will be important to have a clear statement of the scope of any new scrutiny arrangements. It lists a number of proposed policy areas for inclusion.
- 4.37 Respondents were asked for their opinions on the proposed list and any other policy areas in the following question:

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

### **Overall nature of response**

- There were 83 responses to Question 9. Four respondents left comments to the effect of 'no comment', leaving 79 substantive responses for analysis.
- The most common theme in responses was agreement with the policy suggestions included in the consultation document.
- Almost all noted other specific policies for inclusion or made a general call for the inclusion of any or all policy areas relevant to the environment.
- A few shared comments of a general nature, not specifying which policy areas they think should be included within the scope of scrutiny arrangements.

### **Inclusion of all policy areas**

- 4.38 A large number of respondents indicated that they would like all relevant policy areas included within the scope of any scrutiny arrangements. This discussion sometimes included specific issues to include; for example policies that have the potential to affect the historical environment, coastal and marine areas, natural assets and natural capital or climate change.
- 4.39 Several respondents submitted an almost identical response in which they suggested that all policy that has the potential to affect the environment must be considered. They also discussed the inclusion of; any factors<sup>6</sup> likely to affect the elements of the environment referred to in the consultation document, measures designed to protect these elements<sup>7</sup>, reports on the implementation of environmental legislation, economical areas used within the framework of the measures and activities referred to in the consultation document, the state of human health and safety<sup>8</sup> that are or may be affected by the elements of the environment referred to in the consultation document.
- 4.40 Some made more detailed comments indicating that all policy areas that currently sit under EU scrutiny should be included, covering any law, policy or decision that impacts on the environment, as set out in the Environmental Information (Scotland) Regulations 2004.

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<sup>6</sup> substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment

<sup>7</sup> (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements

<sup>8</sup> including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).

### **Additional policy areas**

- 4.41 Several respondents suggested specific, singular policy areas to include within the scope of any scrutiny arrangements. These are summarised in the table in Appendix 11.

### **Reflections on policy**

- 4.42 Many participants shared reflections on policy and policy development in their responses. In this discussion there was reflection that a purposive approach to scoping should be taken, including any areas of doubt, to be consistent with the current application of EU Law. One highlighted the importance of this in relation to key pressures like landownership and agricultural and housing subsidies, suggesting any new system will not succeed unless it explores drivers of environmental change and that these drivers should guide the policy areas included.

### **Clarity**

- 4.43 Some respondents called for clarity about various aspects of the scope of scrutiny arrangements in their responses to Question 9. A small number suggested that 'soil and contaminated land' should be omitted as a separated policy area within the scope of scrutiny arrangements and suggested that soil falls under nature conservation and biodiversity as these are different policy areas.

### **A sample of illustrative quotes that typify the themes identified in this section:**

“ *Scrutiny and performance appraisal are critical if we are to ensure that environmental decision-making is compliant and just, that public bodies are accountable for their decisions, and that our environmental performance is progressing in line with other countries. Withdrawal from the EU would leave a significant gap in this regard and could have wide-ranging implications for environmental performance. (Organisation)*

“ *The loss of the scrutiny function currently carried out by EU institutions will require to be replaced, to provide public confidence that environmental duties and performance are maintained at a high level and that environmental protection is at least as effective as when the UK was within the EU. (Organisation)*

“ *A new body is required which has sufficient resources and powers to provide oversight and to hold government to account. This body has a valuable role as arbiter of the wider public interest in respect of environmental protection. Simply amending the role of a current body, or appointing a 'Commissioner', does not seem to meet the need, implying a low-cost and hence under-powered approach. (Individual)*

## 5. Environmental governance arrangements: considering complaints

- 5.1 Chapter 5 presents an analysis of responses to Questions 10 and 11 of the consultation. These focus on the third area of environmental governance arrangements outlined in the consultation paper, which is a mechanism to consider complaints by the public or civic organisations which can lead to enforcement action. These complaints can be about either government or public authorities in relation to their compliance with environmental law. This includes access to expert and independent advice.
- 5.2 At present, people can report any instances of a failure to comply to the European Commission, which can ultimately lead to proceedings before the Court of Justice of the EU (CJEU). This will cease to be the case following the UK's withdrawal, though existing Scottish mechanisms to bring complaints will continue.
- 5.3 Participants were invited to express their views by responding to the following question:

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

### **Overall nature of response**

- 5.4 Within the 82 responses the overall theme was that the impact for Scotland will be negative.
- Most respondents indicated that they believe the impact in Scotland of the loss of EU complaint mechanisms will be negative.
  - Some respondents made comments of a general nature, without reflecting on any impact. A small number suggested that there will be no impact in Scotland of the loss of EU complaint mechanisms; a few indicated that they are not sure what the impact will be.
  - Conversely, two respondents suggested the impact will be positive. These comments were brief; one simply wrote the word 'beneficial' as their response to the question, the other described the loss as an opportunity in terms of removing bureaucracy.
- 5.5 Many of the responses to this question echoed the comments made in response to Question 5, which asked participants for views on the impact of the loss of engagement with the EU on monitoring, measuring and reporting.

### **Range of negative impacts**

- 5.6 The most prevalent theme in comments was examples of the negative impacts believed to be likely to occur due to the loss of EU complaint mechanisms; some identified multiple impacts. These are set out in the table overleaf.

Specific Impact	Frequency of mentions
Loss of enforcement	24
Lack of accessibility of complaint mechanisms	21
Loss of supra-national oversight	8
Harm to the environment	6
Fewer resources	6
Loss of legal oversight from EU institutions	4
Loss of ability to resolve concerns informally	2
Lack of consistency	1
Loss of the right to petition the European parliament/European Ombudsman/Address EU institutions	1
Loss of protection	1
The removal of an arbitration function	1

### ***Mitigating actions***

- 5.7 Many respondents discussed replacement with new arrangements or mechanisms to mitigate the impacts of the loss of EU mechanisms. In this discussion there were suggestions that legal mechanisms should be reproduced domestically via a new or existing body. Detail from comments which discussed the creation of a new independent body can be found in Chapter 6 where this is covered more extensively.
- 5.8 A small number discussed the difficulty of recreating similar mechanisms domestically, as the EU benefits from scale and multiplicity, and reiterated the importance of separating policy roles from enforcement roles post EU exit.
- 5.9 The Aarhus Convention was also mentioned in a few responses which noted that any new function would need to be in accordance with those of the AC.

### ***General discussion***

- 5.10 Another theme in comments was around impacts in general, without reference to a specific issue. Within this group, many reflected that at present there is no domestic complaints process equivalent to that within the EU. Other points in these responses included: general comments on the importance of EU complaints mechanisms to date and concern surrounding maintenance of environmental standards post EU exit.

### ***Examples***

- 5.11 Several respondents shared specific examples for the SG to consider in relation to impacts of the loss of EU complaint mechanisms. These included reflections on recent cases considered by the EU complains mechanism, or participants' direct experiences of engaging with complaints processes.

### ***Other***

- 5.12 A small number of respondents provided comments that did not align with other themes identified in response to Question 10. These included reflections on the Roundtable's assessment of key issues and an observation that Scotland would be capable of handling complaints without EU mechanisms. One highlighted the opportunity to ensure projects critical to the climate change agenda, such as achieving net zero carbon emissions by 2045, are supported through any new mechanisms.

## **Workshops**

- 5.13 At the workshops almost all agreed that the scope of the type of complaints that could be heard would need to be clear. Many noted that this should not duplicate existing routes for making complaints. Some were also concerned that any new procedure might be used as an additional level of complaint or appeal, causing delay in if there was a disagreement at the level of decision making in individual cases. There was strong support for a focus on prevention, mediation and rectification, but a number of participants stressed the need for ultimate recourse to the courts as necessary to ensure the effective functioning of any future approach.

## Responses to Question 11: Replacing the role of the European Commission in receiving complaints

- 5.14 The consultation document noted the Roundtable conclusion that replacing functions of the European Commission would involve either expanding the role of existing agencies and independent bodies, or providing powers to a new body. A new body, if created, would likely oversee the different parts of environmental governance - complaints being one - in a single institutional arrangement.
- 5.15 Respondents were invited to express their opinions on the need for a new function in relation to complaints by answering the following question:

**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?*

- 5.16 In response to Question 11; 62% selected 'yes', 2% selected 'no', 7% selected 'don't know', 29% did not answer the question.

### ***Overall nature of response***

- There were 75 comments in response to Question 11.
- Three gave a response to the effect of 'no comment', leaving 72 substantive responses for analysis.
- The most common theme in these responses was that a new function would be required to replace the current role of the European Commission.
- A small number said they do not support the creation of a new function.

### ***The form of a new body***

- 5.17 The prevalent theme in responses to this question was discussion of the creation of a new function and suggestions as to the model of this function.
- 5.18 The most common suggestion as to the model was for the formation of an independent body. This appeared frequently as 'independent body', 'independent environmental body', 'independent body of experts' and 'independent regulator'. The second most common suggestion was the creation of an 'independent watchdog'.
- 5.19 Comments related to an independent body or watchdog can be found in Chapter 6 where they are summarised in the discussion of the role and powers of such a function. This chapter focuses on any alternative functions suggested in response to Question 11.
- 5.20 Other suggestions included:
- The creation of an Environmental Ombudsman
  - Extending existing mechanisms such as the Petitions Committee, SEPA and SPSO to deal with environmental complaints
  - Development of a panel
  - Developing a function comparable to the European Commission
  - Establishing an Environmental Court or creating a specialist section of judiciary
  - Creation of one overall UK body for handling complaints
  - Greater use of judicial review.

### ***The functions of any new model or body***

- 5.21 Several respondents described the desired functions of any replacement model or body. The majority of this discussion is covered in Chapter 6 as noted above.
- 5.22 A small number of respondents suggested that an ‘environmental court’ should comply with the Aarhus convention and should operate according to its principles.

### ***General reflections***

- 5.23 Some respondents offered general reflections about a potential new function, model or body. These included opportunities, challenges and examples for the SG to consider. A small number suggested that the loss of an EU complaints mechanism presents an opportunity for Scotland to create a more relevant function as a replacement. It was also noted that there is no one straightforward route to the implementation of any new body.

### ***Resources***

- 5.24 The resource implications of the creation of any new function, model or body were also discussed. Themes in these comments included the need for adequate resourcing including expertise, knowledge and funding. The campaign response also highlighted the need to ensure adequate financial resources were available for protection.

### ***Reference to the Roundtable***

- 5.25 A small number of respondents explicitly mentioned the Roundtable, offering support and agreement with the suggestions and recommendations from the Roundtable report.

### ***A sample of illustrative quotes that typify the themes identified in this section:***

“ *It will be significant – a major loss. While used relatively infrequently, it provides an essential and affordable legal recourse for individuals and organisations concerned about public authorities’ implementation of environmental legislation to seek an investigation/redress. As with any ultimate legal recourse, the power of this mechanism is less its use or application, but rather its availability. (SE LINK)*

“ *We believe that to ensure legal certainty similar complaints and legal redress mechanisms to those of the EU should be reproduced domestically. While we can count on the autonomy of the Courts to handle such cases, the crucial issue will be to ensure that supervision, complaints and enforcement powers are kept separate from those of the government of the day. (COSLA)*

“ *The watchdog/independent scrutiny body should be able to determine its own structure and procedures and how it will organise the ‘sifting’ of complaints or investigate under its own initiative. The process of choosing the members of the watchdog should then be subject to parliamentary scrutiny – parliament should draw up a list of those with scientific, legal, ecological, social, cultural expertise, sourced from practice and academia. (Individual)*

## 6. Environmental governance arrangements: enforcing action

- 6.1 Chapter 6 presents an analysis of responses to Questions 12 and 13 of the consultation. These focus on the last of the environmental governance arrangements outlined in the consultation paper - the enforcement of effective implementation by government of environmental law.
- 6.2 Currently the European Commission seeks to resolve any issues through guidance and discussion, but the CJEU can be asked to rule on an issue and, if necessary, require remedy and apply sanctions on members states if EU law has been breached.
- 6.3 Participants were invited to express their views on enforcement powers by responding to the following question:

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

### ***Overall nature of response***

- 6.4 Over four fifths of participants (83 out of 99) gave a detailed response to the question, with the remaining 16 either stating 'no comment' or leaving this question blank.
- The most common theme in responses was an anticipated negative impact. This was typically based on the loss of the deterrent of EU enforcement, the potential for lowering / weakening of environmental standards and concern that the environment is likely to suffer as a result. A number of other negative impacts were identified by smaller numbers of participants.
  - Some respondents indicated there would be minimal or no impact; another felt the impact would be beneficial.
  - Several participants suggested actions to mitigate the impact of the loss.

### ***Suggested mitigating actions***

- 6.5 Despite the focus of Question 12 on the impact of the loss of EU enforcement powers, a common theme in responses was some suggestion as to how any impact could be mitigated. That is the focus of Question 13, so those comments have been included in the analysis within that chapter.

### ***Discussions around the governance / enforcement gap***

- 6.6 A large number of comments related in some way to the gap in governance and enforcement that would result from the loss of EU enforcement powers. Several made general observations on reductions in scrutiny or accountability.
- 6.7 Some specific issues were also raised. These included:
- The deterrence effect of the EU's enforcement powers and how their absence and deferring to current domestic enforcement would lead to poorer implementation or more breaches
  - Lack of penalties, for example insufficient mechanisms to penalise breaches or major breaches going without punishment
  - The increased difficulty of holding the government to account

- Concerns about greater non-compliance, or that breaches of EU law will increase
- Poorer enforcement generally
- General comments about the creation of a governance gap
- Concerns that breaches in environmental protection/law are less likely to be identified / addressed / challenged.

### ***Lowering / weakening of environmental standards***

6.8 Several participants highlighted the potential impact of a lowering / weakening of environmental standards.

### ***Environmental damage***

6.9 The loss of EU enforcement powers was noted as a direct risk to the environment. Comments on this theme included brief acknowledgements of potential harm to the environment or mention of areas which could be impacted, such as endangered species, human health, biodiversity, society, the marine environment.

### ***Other negative impacts***

6.10 Several respondents identified other negative impacts which they thought might result from the loss of EU enforcement powers. These included increased potential for business and/or lobbyists to challenge or over-ride environmental protections and a decline in future trade due to lack of regulatory alignment or falling standards.

### ***Fines and penalties***

6.11 Fines were also mentioned by some respondents. These discussions included the value of fines (or the threat of fines) as a deterrent and in pushing organisations and governments to adhere to environmental obligations or to conclude legal disputes within the UK.

### ***No impact or positive impact***

6.12 Some respondents indicated they believed the loss of EU enforcement powers would have either a positive or no/limited impact.

6.13 As noted above, one respondent claimed there would be a positive impact, stating it would be 'beneficial'.

6.14 A small number of respondents explicitly said there would be no impact / loss, with two elaborating that Scotland can create its own enforcement powers. A few indicated there would hopefully be no change if the Scottish Government and public authorities follow policies and act in line with their commitments. Others commented that the impact would appear to be minimal, given the small number of relevant cases currently.

### ***Other comments provided by respondents***

6.15 Respondents provided examples as part of their comments which are presented in Appendix 14. Some highlighted the potential for the de-prioritising of environmental protection (for short term economic or political benefits) and a small number commented on the loss of diplomacy: for example that there would be a reduction in expertise and sharing of information, or how the EU's 'soft powers' such as taking part in negotiations, mediation and dispute resolution, gained through expertise and knowing what member states are doing) can be replicated post EU exit.

- 6.16 A small number of respondents made very specific detailed points which, given space limitations in this report, have been signposted to the Scottish Government for further review. These included comments on the issue of public access to justice the ability of courts to operate in a way in which decisions involve assessing scientific and technical evidence.
- 6.17 Of those who indicated there would be a negative impact there were comments that Scotland needs to emphasise that environmental harms are unacceptable and protection comes before development, and a general point that, in spite of the small number of EU enforcement actions, there needs to be greater resourcing of enforcement being carried out across Scotland.

## Responses to Question 13: Ways to address the loss of EU enforcement powers

- 6.18 The consultation paper notes that it will not be possible to replace the supranational role played by the European institutions and states that a view has yet to be reached on whether additional measures are needed or whether greater use of existing domestic mechanisms would be sufficient. It suggests that one option is a new body with the power to refer the Scottish Government or a public authority to a Scottish court.
- 6.19 Respondents were invited to express their views on ways to mitigate the loss of EU enforcement powers by answering the following question:

**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.*

### **Overall nature of response**

- 6.20 Over four fifths of participants (81 out of 99) gave a detailed response to the question, with the remaining 18 either stating 'no comment' or leaving this question blank. As noted in the previous chapter, elements of responses given at Question 12 which suggested actions to mitigate the impact of the loss of EU enforcement powers have been included in the analysis of Question 13 detailed here.
- The most frequent theme in responses was specific suggestions about what could be done to address the loss of EU enforcement. By far the most common was the creation of an independent body / watchdog, with respondents suggesting a range of functions / powers being given to such a body. Several respondents also suggested the creation of an Environmental Court.
  - There were a number of other general comments about new enforcement powers, and some comments and concerns raised around the need to work both with the rest of the UK and internationally.
  - Several respondents made general comments in response to the question. These are included where relevant in the analysis below, but the most common theme was the need to ensure domestic enforcement processes and powers are put in place.

### **An independent body or 'watchdog' and its powers**

- 6.21 As noted in earlier sections, many respondents called for the creation of a new independent body or watchdog to take on some or all elements of the EU's current governance role. The standard wording of the campaign response also called for 'an independent and well-resourced watchdog to enforce environmental protections', created by a Scottish Environment Act.
- 6.22 There was considerable overlap in the detail of comments about a new independent body. This section of the report provides an overview of all views given on the role and powers of a new body - regardless of whether this was in relation to scrutiny, complaints or enforcement, but referencing these areas where relevant.
- 6.23 Although some respondents had specific, individual views on such a body, a number of common themes were identified in the reasons for creating such a body, and suggestions for its role and powers.
- 6.24 Some respondents did not go into specific detail but nevertheless provided general comments around the functioning of a new body. These included:

- repeated mentions of the need to be independent of government or existing government bodies; and
- a few respondents' general comments relating to a role in monitoring compliance and enforcing standards or legislation.

6.25 In terms of roles as a scrutiny body, the most prevalent theme was to scrutinise, investigate and enforce the implementation of environmental law, and the application of the EU principles by the Scottish Government and its agencies. Respondents also shared the suggestion that the body should hold government or its agencies to account.

6.26 In terms of roles as a complaints body or mechanism, a range of suggestions were shared.

- Most mentions discussed the need to deal with complaints or resolve disputes, including receiving or acting on those from citizens
- Accessibility and enabling members of the public and organisations such as charities to easily submit complaints
- To appropriately investigate, evaluate and remedy complaints with a suitable penalty
- Promote transparency by publishing a complaints procedure making clear the types of complaints it is likely to investigate
- Encourage positive environmental outcomes and focus on social implications such as access to environmental information and public engagement
- A few respondents noted it would be a poor use of resources for the new body to have an obligation to respond to all complaints.

6.27 Suggested powers to be given to the body in relation to enforcement varied. The most commonly mentioned power was to instigate court action or judicial review. The second most common theme was the need for a suitable range of enforcement powers, including both legal and 'softer' powers, so appropriate actions can be taken on a case-by-case basis. This was often cited as part of an escalating enforcement process, leaving court action as a last resort. The most frequent point in this discussion was that Scotland needs to introduce its own enforcement powers (with a change in legislation to reflect this) with many stating these powers should replicate those currently held by the EU. Some identified a need to embed EU principles in domestic law whilst a few argued for the continuation of the Aarhus principles. Other powers mentioned included:

- To suggest or impose remedial action
- Impose fines, penalties or sanctions in cases of non-compliance
- A few respondents mentioned inspection and evidence collection, and the ability to impose interim measures to ensure no further harm is done during consideration of issues.

6.28 Other points for consideration in the creation and management of a new body included:

- repeated mentions of the need for adequate resourcing and an independent budget;
- the need for a new body to have the necessary capacity, scientific and technical expertise; and
- a few respondents reiterated that the body should have the same level of scrutiny or assessment that is currently in place under the EU.

### ***An environmental court or tribunal and its functions***

- 6.29 When discussing alternative models, several respondents suggested the creation of an environmental court or tribunal to replace the CJEU. Some referenced previous debates on the creation of an environmental court and argued that this should be re-opened. Reasons for creating such a body, and suggestions for its powers, included:
- to deal with the complex and technical questions of environmental law;
  - to take remedial actions e.g. quash decisions, order legal or administrative actions and compel remedial action and restoration; and
  - be fully Aarhus compliant i.e. not prohibitively expensive to the complainer and able to consider the merits of the case.

### ***Possible limitations of approaches***

- 6.30 Many participants reflected on the challenges inherent in different approaches. These focussed primarily on the limitations of resorting to judicial review, and of empowering an existing body with enforcement powers.
- 6.31 Potential limitations of the use of judicial review included comments that the scope and processes of judicial review in Scotland are not designed to meet the needs of environmental cases. A few highlighted that giving a new body the right to refer an issue to judicial review would not replicate the current EU mechanisms. A small number noted that review of the domestic judicial system is likely to be costly, bureaucratic and would not necessarily result in any significantly better outcomes.
- 6.32 Discussion of the limitations of empowering an existing body included views from a small number of respondents that this would be ineffective, that they are not placed to do this due to their position or expertise, that those currently regulating need to be overhauled to work effectively or that this implies a low-cost / under-powered approach.
- 6.33 A small number of respondents felt that powers to apply financial sanctions need to be carefully considered to ensure that resources are not taken away from other environmental issues.
- 6.34 There were also a small number of comments that the proposed Environmental Commissioner is lacking in powers, including a view that any replacement to the EU fine levying mechanisms such as a proposed Commissioner needs sanction powers to ensure compliance.

### ***Other suggested models or arrangements***

- 6.35 Other less frequent suggestions in addition to those already discussed included creating a panel or commission of experts or using the UK Supreme Court.

### ***Intra-UK considerations***

- 6.36 A small number of comments were made at Question 12 and Question 13 about the need for continued co-operation across the UK to ensure consistency in approach and to deal with cross-border matters. The small number of singular comments provided at Questions 12 and 13 are detailed in Chapter 4.
- 6.37 Across the consultation, respondents expressed different views about the formation of a new body. Some suggested a new body for Scotland should act as a counterpart of the proposed Office of Environmental Protection (OEP) in England, have a collaborative

relationship with the OEP, or that it should take a pan-UK perspective on environmental trends.

- 6.38 Others argued for the OEP to be extended to Scotland, with one oversight body for the whole of the UK (co-designed and developed by all administrations) or that there should be a federal approach with devolved OEPs in the home nations and a UK steering group. One argument for these more coordinated approaches was that they would provide more effective environmental protection through adequate resourcing. Two respondents provided comments on potential constitutional or devolution related problems arising from the OEP not covering Scotland.

#### **Other comments**

- 6.39 A small number of respondents commented on the need to set clear targets for environmental protection along with adequate funding,
- 6.40 A few called for greater sanctions to be used, including a comprehensive range of fines for non-compliance and a call for the establishment of a law of ecocide. Conversely, one argued that: *'appropriate emphasis is placed on incentivising appropriate environmental outcomes to minimise the potentially enormous costs of infraction.'*

#### **Workshops**

- 6.41 When discussing the options for an enforcement function, workshop participants were uncertain as to what would be most effective. As with complaints, final recourse to the courts was stressed as necessary. Some discussed the limitations of financial penalties and a number also highlighted that further consideration of the interaction between new functions and existing routes of accountability was needed.

#### **A sample of illustrative quotes that typify the themes identified in this section:**

“ 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. (Royal Society of Edinburgh)

“ Lack of effective enforcement mechanisms, as a general rule, increases the likelihood that standards will slip, making the widening of a gap between rhetoric and reality more likely. (Chartered Institute for Archaeologists)

“ The great advantage of Europe is that they provide an overarching legal judgement which prevents national governments sacrificing wildlife and landscapes in response to lobbying by big industry. (Sealife Adventures)

“ Enshrine the environmental principles in law and include Scottish law and policy within the remit of a new UK-wide environmental governance watchdog which is afforded the appropriate powers to hold government and other public bodies with authority over environmental management fully to account through a suite of escalating enforcement powers. (Chartered Institution of Water and Environmental Management)

“

*There is a need for a new independent ‘watchdog’ body, with powers of last resort to refer alleged non-compliance to a Court. However, giving a new body the right to refer an issue to a Sheriff Court or the Court of Session would not sufficiently replicate the current EU compliance mechanisms. A new Environmental Court is therefore required. (Anonymous)*

## 7. Conclusions

- 7.1 A range of informed stakeholders took part in the consultation. They were typically highly-engaged and knowledgeable about relevant matters, including legal issues, management of Scotland's resources, planning and delivering services, environmental matters, the development of policy and monitoring environmental change.
- 7.2 Participants shared suggestions, examples and reflections on future environmental principles and governance in Scotland. They identified potential impacts of exit from the EU, the challenges and opportunities this may present, and the mitigating actions that Scotland can take to protect or enhance environmental protection. These responses provide a useful evidence base for the Scottish Government to draw upon in the development of the final legislation.
- 7.3 Responses to key proposals put forward by the Scottish Government were largely positive.
- Clear support was evident for the introduction of a duty and a policy statement to guide the interpretation and application of a duty. In and around these endorsements was a high level of discussion and differences of opinion about whom the duty should apply to, and which principles to include within the duty.
  - Most believe a new function will be required to replace the current role of the European Commission in receiving complaints, and a range of models and suggestions were put forward about how to fulfil this role.
  - Almost all responses highlighted negative impacts of the loss of engagement with the EU on monitoring, measuring and reporting; many advocated for the establishment of an independent body to replicate this function.
  - The majority believe that governance issues will arise as a result of the loss of EU scrutiny and assessment of performance. Over half of the respondents called for the creation of a new body to meet the requirements for effective scrutiny of environmental policy and delivery; most agreed with the scope of the policy suggestions included in the consultation, with many calling for the scrutiny to be extended to new areas.
  - Most believe the loss of the EU complaints function and EU enforcement powers will have a negative impact on Scotland. Almost all shared suggestions about what could be done to address this. Many advocated for the establishment of an independent body or watchdog.
- 7.4 Overall the Scottish Government's proposals were endorsed by respondents. However, given the breadth of views amongst respondents about priorities, areas of focus, the scope of the legal framework, calls for more detail, and the range in appetite in terms of ambition, it may be a challenge to develop a legislative solution that satisfies all interested audiences.

## Appendix 1: Approach to analysis and reporting

The analysis team developed a qualitative coding framework based on a review of the consultation questions and sample of responses. The report also draws on summaries of discussions at a consultation workshop hosted by the Scottish Government.

This report presents the range of views expressed and trends amongst responses. During analysis it became evident that some participants repeated aspects of their responses across questions and in some cases, parts of a response aligned more closely with another question in the discussion document. To avoid repetition, the analysis is presented under the most appropriate thematic heading.

Where appropriate, quotes have been included to illustrate key points. Quotes provide useful examples, insights and contextual information, but may not always represent the views of entire groups. If participants gave permission for their response to be published, we have quoted directly, however minor spelling or grammatical errors have been corrected to improve readability.

Two individuals asked for their response not to be published. Their responses were included in analysis, but no quotes have been drawn from their submissions. Fifteen organisations asked for their response to be published without naming them, in those cases, we have attributed quotes to 'organisation, anonymous'. In all cases, where quotes are drawn from an individual respondent, they have been attributed to an 'individual, anonymous' rather than a specific person.

## Appendix 2: Quantitative summary of responses (where available)

Question	Yes		No		Don't know		Not answered		Number of Detailed Comments
	Total	%	Total	%	Total	%	Total	%	
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?	69	70%	5	5%	1	1%	24	24%	78
Question 2: Do you agree that the duty should not extend to other functions exercised by Scottish Ministers and public authorities in Scotland?	21	21%	38	38%	14	14%	26	26%	72
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?	41	41%	28	28%	3	3%	27	27%	70
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?	68	69%	2	2%	4	4%	25	25%	76
Question 7: Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?	56	57%	7	7%	8	8%	28	28%	79
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?	61	62%	2	2%	7	7%	29	29%	71

## Appendix 3: Chapter 3. Q1

### ***Issue with current wording / alternative wording suggestion***

Examples of other suggested wording identified in the responses are listed below.

- A comment suggesting the use of the wording ‘sustainable development’ instead of ‘sustainable economic growth’
- A specific comment about the use of the phrase ‘rectification at source’ and highlighting the need for more detailed consideration of the relevant connected components, given this can be interpreted as excluding downstream and consequential effects
- A comment requesting an expansion of the terminology used throughout to also include the historic (and not just natural) environment
- A detailed response which has been signposted for review by Scottish Government, suggesting terminology used in relation to other duties - another individual made a similar point as part of their submission, citing some of the same duties
- A specific suggestion that the duty should require ministers to: *‘i) act in accordance with the environmental principles in the development of environmental policy ii) have regard to the principles in wider policy-making’*
- A general observation that the wording of the duty needs to be robust
- Contrary to these arguments, one respondent noted that ‘duty to have regard’ to principles has the advantage of having a clear and established meaning in Scots law and would ensure that a decision-maker turned their mind to the principles, whilst leaving it to the decision-maker to determine how to apply the principles in practice.

### ***Why the duty has value***

Other comments on the value of the duty included:

- That the duty will embed the four principles in domestic law
- Inclusion of the principles will provide a mechanism by which they could be challenged in court
- A suggestion the duty will ensure the principles play a meaningful role in the implementation of environmental policy and decision making
- That the introduction of a duty *‘would obviate the complexities associated with extending the application of the principles across all powers and functions.’*

### ***Implementation and enforcement***

Several respondents reflected how the duty should be implemented and enforced. Whilst this is discussed elsewhere in the consultation, the comments are included below for completeness.

- Comments on mechanisms to ensure the duty is reported on, monitored and scrutinised
  - For a regular report on the application of the principles to be presented to and scrutinised by the Scottish Parliament (committee)
  - General comments that this is required, without specifying how
  - Recognition of the need for independent oversight / regulation to scrutinise and monitor and hold Scottish Ministers accountable
  - A call to set up an independent enforcement body.
- Other comments on implementing the duty:

- For the duty to apply to both formation and implementation of policy and that the SG must exercise its powers to ensure the duty is met
- The need to ensure the principles are properly implemented in decision making
- For a requirement to add a discussion about how the principles have been taken into account into environmental assessments
- An expression of concern about agencies conforming to the duty
- Questions about the resources available to the Scottish Government to manage the implementation of the principles and handle cases related to it.

***How a duty may relate to a wider environment strategy***

Other comments in relation to how a duty may relate to a wider environment strategy included:

- A call for a framework for planning and delivering environmental improvements
- A suggestion that any Act should cover the cultural/built environment as well as the natural environment
- For recognition that environmental legislation and policy is not the only legislation and policy which affects the environment
- For the duty to also include standards relating to environmental protection
- A call to be involved in the development of an environment strategy.

***An opportunity for ambition***

Some commented on the duty as an opportunity to show ambition, including:

- General comments supporting the introduction of the duty but indicated that something more ambitious could replace it in the future
- A need to enhance and exceed the principles
- An opportunity to overcome limitations resulting from EU membership.

***Other comments in relation to the proposed duty***

- Respondents discussed themes of particular interest including:
  - The historic cultural/built environment
  - European Landscape Convention
  - Legal implications of the proposed changes
  - Invasive non-native species.
- Views were expressed that Scotland would be better outside the EU / conforming to EU principles.
- An emphasis on gravity of the situation, including the threats of climate change and biodiversity loss was urged by some.
- Some stressed a need to offset environmental damage from increased tourism.

## Appendix 4: Chapter 4, Q2

### ***Examples from elsewhere***

Thirteen respondents cited examples from elsewhere for the SG to consider. These are detailed below.

- Seven respondents cited the Biodiversity Duty / Nature Conservation (Scotland) Act 2004; Part 1, Section 1 which imposes a duty on: *'every public body and office-holder, in exercising any functions, to further the conservation of biodiversity'*.
- Three respondents cited the House of Commons Environmental Audit Committee which recommended that all public authorities should act in accordance with the environmental principles.
- A citation of Sustainable Shetland and Bova v Highland Council (both 2013) as examples of cases where the argument that the EU duties do not apply to all planning decisions was not made.
- One respondent cited the Akester ruling that authorities were *'any Minister, government department, public or statutory undertaker, public body of any description or person holding public office. The expression also includes any person exercising any function of a competent authority in the United Kingdom.'*
- A citation of G van Calster and L Reins, EU Environmental Law (Edward Elgar 2017), 17 which discusses the issue of incorporating principles into secondary law.
- One stated that *'literature on good governance often advocates that the State should set out clear framing or steering principles for those bodies involved in implementing policy; and devolve the means by which these principles are implemented to agencies and bodies at more regional or local scales (Blackstock et al., 2017 ). The existing duties of agencies such as SEPA or SNH, or the duty on local authorities to conserve biodiversity, mean that these agencies are already implicitly, if not explicitly, following these principles in their current practices'*.

## Appendix 5: Chapter 5, Q3

### ***Non-regression***

Comments about non-regression included:

- a suggestion that this should be considered but also noted that it could be a requirement in primary legislation to periodically review alignment with the EU; and
- an acknowledgment that it could be included but arguing that it may be misapplied to require a continuation of existing regulations when new / different ones may be more appropriate.

### ***Individual principles***

Respondents referenced individual principles in response to Question 3. Those marked \* are Aarhus rights, and are part of the nine principles included in the UK Environment Bill and EU Withdrawal Bill (along with the four principles in the consultation and Integration and Sustainable Development).

- \*Environmental justice / access to justice in environmental matters
- \*Public access to environmental information
- \*Public participation in environmental decision-making
- UN Convention on Biological Diversity / Biodiversity Duty
- Ecosystems approach
- Net Biodiversity Gain / Environmental Net Gain
- Duty of care / duty to protect and restore ecosystems / principle of restoration
- Proportionality principle
- Innovation principle
- Appropriate spatial and temporal scales
- Consistency of standards across the UK
- Principle of 'maintaining and increasing natural capital'
- Principle of sustainable use of natural resources
- Principle of science-based decision-making
- Principles in relation ensuring actions do not contribute to climate change
- Principles in relation to creating a circular economy, closed loop materials cycle
- A principle that places a duty on all public and private organisations in Scotland to publish an annual statement of their environmental and climate change impact, and an estimate of the forecast impact of their activities for the following year
- Overriding public interest only
- Principle of non-transboundary harm and a principle of enabling engagement in environmental decision-making in cross border scenarios
- Principle of making use of the best available scientific and technical expertise
- Principle of intergenerational equity
- Transparency
- Subsidiarity
- The future generations principle
- Principle of understanding and acknowledging the value of natural systems
- Improving the welfare of humans and animals and recognising 'animal sentience'
- Principle of improving public health and well-being.

## Appendix 6: Chapter 6, Q4

### ***Development of the policy statement***

Other comments in relation to the development of the policy statement are listed below.

- Singular comments included:
  - a suggestion it should be drawn up by a panel of independent experts;
  - that it could be developed with reference to European case law and good practice;
  - the need to consider consistency with the UK when developing the statement; and
  - a suggestion it should be issued in draft first.
- There was a suggestion that the Scottish Government may wish to consider what ‘implementation actions’ it will need to take when the statement is approved and becomes operable - this might include publication and promotion, workshops for key staff and relevant stakeholders, etc.
- In relation to the development of a policy statement, three respondents gave examples which could be used as models to imitate when developing the statement: The National Planning Framework, the Scottish Outdoor Access Code and the National Marine Plan.
- One respondent made a further comment about the value of the statement, highlighting the role of the statement in particular if Scotland decides to implement additional principles. Another made a general comment on the usefulness of the statement.

### ***Content of the policy statement***

Singular suggestions were made about the content, which often related to participant’s individual views and areas of expertise.

- For the policy statement to detail any divergence between Scotland and the rest of the UK/EU
- To provide guidance at a local and national level (if the duty applies to local and public authorities)
- To set out how organisations and members of the public can raise concerns or complaints in relation to the legislation
- To build on existing interpretations but reflect a Scottish context
- For transparency to show how the principles have been considered e.g. what information was taken into account, perhaps in reports to an oversight body
- For the policy statement to reference the historic environment
- That the guidance could be tailored to different public sector organisations and their specific contexts.

### ***Other potential roles for the policy statement (not directly related to providing guidance and interpretation)***

- Singular views included:
  - a suggestion the policy statement can link the policy objectives with the principles (which will assist in interpretation);
  - for the guidance to provide clarification on the reasonableness of applicability;

- to view the statement as an opportunity to put in place a framework for environmental governance in Scotland which sets out how the targets and objectives in legislation will be met; and
- for the policy statement to be a place where government articulates Scotland's distinctive approach to environmental protection.
- One respondent believed it will prevent misuse of funds; another suggested that it would contribute to capacity building of decision makers, including local authorities.

### ***Other responses to the policy statement***

Comments that did not align with the other themes in response to Question 4 are listed below.

- A suggestion that consideration could be given to embedding the approach in the National Performance Framework, either in the outcomes, the indicators or in both
- An observation that the four principles could be reflected in other key documents, such as the Scottish Regulators' Strategic Code of Practice, as a means of ensuring that regulators fully embrace them
- A very detailed response elaborating on the legal frameworks which will need to be in place across the UK
- A comment that the public should be made aware of the statement
- A detailed example which can be considered by the Scottish Government, illustrating experience of the misapplication or lack of understanding of principles, whilst another respondent named agencies who they felt should not be given powers due to their perceived current environmental performance.

### ***The interplay between the policy statement, courts and case law***

Singular suggestions about courts and case law are listed below.

- A request for clarification on whether it is intended for courts to take account of the statement (even if the text does not carry legal force)
- An observation that even if case law develops over time, the early framing of the law in a policy statement is valuable
- One respondent commented that the statement should include an explanation of case law so that those implementing the principles understand how the courts have interpreted them.

## Appendix 7: Chapter 7, Q5

### ***Comments on monitoring, measuring and reporting***

There were fifteen comments in relation to monitoring, measuring and reporting.

- Three respondents discussed the need for collaboration and joint working to ensure, post EU exit, the sharing and comparison of data can continue
- There was one comment indicating support for the SG's commitment to review
- A suggestion undertaking a scoping study to understand what is currently monitored/measured/reported
- Support for the establishment of a counterpart to the Office for Environmental Protection to provide necessary capacity for monitoring, measuring and reporting
- A call for existing institutional and individual capabilities for monitoring and reporting to be maintained, and that existing bodies, such as the Joint Nature Conservation Committee and SG agencies could undertake this role
- Discussion of the importance of investing in new technology to allow real-time data provision as a tool for providing effective monitoring
- A suggestion that the SG continue with existing approaches, with examples which have been signposted to the SG for consideration
- An indication of concern that withdrawal from the EU may affect environmental outcomes and market access to the EU
- A detailed response with a list of suggestions for mitigation
- Discussion of the need for consistent data comparison to avoid unnecessary resource (bureaucracy and expense)
- Notes on the risk of the formation of environmental legislation in Scotland being derived from EU data to which Scotland has not contributed
- A point that environmental issues are global and therefore data sharing should sit outside of European Control
- There was a suggestion that requiring Member States to report on environmental policy implementation to the EU was an important vehicle for policy learning and improvement. This respondent described a fear that loss of data comparison 'could result in a 'race to the bottom' where jurisdictions legislate for the minimum environmental standards in response to trade negotiations, potentially manifesting in 'pollution tourism' whereby waste is dumped in areas with lower environmental standards for economic gain.

### ***Reduced transparency and accountability***

Singular comments in relation to reduced transparency and accountability are listed below.

- A suggestion that regular reports to the Commission on the ability to deliver against targets should be provided by the UK Government and that these should be available to the public ensuring all bodies, groups and governments are held accountable
- One respondent mentioned Article 5 of the Aarhus Convention and the duty to actively disseminate environmental information, therefore requiring public bodies to actively disseminate information.

### ***Specific examples***

Specific examples shared in response to Question 5 are given below.

- The loss of engagement with the EU in relation to poor regulation of Scottish Paper Mills
- Cross-border issues, in particular loss of coordination in biosecurity - this respondent also raised the issue of restriction on volunteering on conservation reserves
- An expression of concern about Invasive Non-Native Species (INNS) biosecurity and management actions, asking how these will function across UK countries and EU trading partners post EU exit
- Intensive farming in agricultural sectors, noting these have a higher monitoring requirement due to the Integrated Pollution Prevention and Control regime (IPPC) and that clarity in this sector is required.

### ***Loss of funding***

Comments on a loss of funding included:

- concern about accessing EU Funded programmes, citing Horizon Europe as an example; and
- the identification of an issue specifically regarding the marine environment and a suggestion that EU exit should not justify reduced resources in relation to monitoring the marine and coastal environment.

### ***References to the Roundtable on Environment and Climate Change***

Other references to the Roundtable included:

- mention of one respondent's input into the Roundtable Report (suggesting loss of engagement will impact academic development, learning and practice quality);
- a reference to the Roundtable when explaining concern about losing the ability to benchmark performance against EU nations; and
- highlighting EU data sharing institutions for Scotland to maintain connections with.

### ***Positive impacts***

Potential positive impacts of a loss of EU engagement were mentioned.

- There could be opportunities such as recognising other aspects of the environment e.g. culture and the historic environment, which could lead to a more holistic approach to monitoring, measuring and reporting
- A general supportive comment.

## Appendix 8: Chapter 3, Q6

### **Transparency**

Comments on transparency are listed below.

- Call for a review of NDPB's to ensure accountability and transparency
- For the introduction of fines for those who fail to notify a pollution incident immediately
- Clarity as to which body would now be responsible for scrutiny.

### **Resources/costs/efficiency**

References to resources, costs and efficiency are listed below.

- That requirements could be aligned with EU requirements but with consideration of budget constraints
- The review should consider the cost of maintaining historical data and how new technologies for data collection could create cost efficiency
- Reference to reports that discuss the importance of investing in monitoring and evaluation, and that currently budgets for monitoring are often less than recommended.

### **Upholding existing reporting and monitoring requirements**

In relation to upholding existing monitoring and reporting requirements, there were several comments:

- a suggestion that the Scottish SEA legislation should be maintained;
- reiteration of a response to an earlier question, urging the SG to continue membership with the EEA and therefore that requirements should be aligned with EU requirements; and
- for current statutory requirement to be maintained, to ensure integrated social and environmental assessments of the natural environment, identifying priorities, legislation failings and to ensure integrity of research.

### **Data interpreting and reporting**

Comments in relation to data interpreting and reporting are listed below.

- A list of the following issues to review: *'1) Arrangements for the collection and publication of Scottish data. 2) Arrangements for the association of Scottish data with UK information. 3) Input of Scottish and UK data into the European Environment Agency (EEA). 4) Access to Europe-wide data through the EEA. 5) Any new developments (see consultation paper (CP), paragraph 58).'*
- For the review to consider where data results are reported, the outcomes of reporting and what the data is then used for while identifying irregularities due to a loss of engagement with the EU
- A suggestion this loss of engagement provides an opportunity to clarify data requirements
- A discussion that the review should consider linkages between environmental principles and other legislative areas

- For the review to cover the value of the data in relation to impact
- The review should assess how datasets are reported on and whether they are representative of trends
- The possibility of voluntarily reporting on data to the EU post exit
- The review should cover how the data is presented
- Data gaps.

Discussion of data gaps included the comments below.

- Clarity about commitments to data collection before a full review takes place
- To clarify the types of data in terms of environmental performance, regulatory policy, implementation and compliance with EU law in the review and whether any of these overlap with data reported for other purposes
- The review to cover real time data and provided a list of examples of this that have been signposted to the SG for consideration
- Discussion the current lack of ecosystem data.

### ***Evidence to inform the review***

Comments on evidence that should inform the review included:

- the creation of a forum of experts;
- the breadth of information and datasets already gathered by NDPB's to be considered in reference to the purpose and use of the information; and
- a general comment suggesting information to inform assessments on progress against agreed outcomes and activities in environmental policies should be considered.

### ***Alignment with other monitoring frameworks***

One respondent discussed the need for the review to comply with international sustainability targets.

### ***Issues with current reporting and monitoring***

Issues with current reporting and monitoring included:

- a discussion of specific environmental areas, such as aquaculture and that the current system of regulation does not work;
- concern about the risk of pursuing only one stream of monitoring;
- a suggestion that the review should consider taking a more holistic approach to monitoring and reporting than currently exists;
- dissatisfaction with the current arrangements concerning construction; and
- an observation that aspects of the EU reporting can be restrictive, and inconsistent with taking a more systemic and dynamic approach to managing the environment.

### ***Data quality***

Reflections on data quality included:

- that the level of detail in reporting alongside the frequency and outcomes could influence and impact data quality;
- data quality as an issue with current reporting and monitoring, explaining that the review should assess the extent of the issue and examples of inaccurate data; and

- the role of the EEA in assessing data quality, and that the SG should consider this an issue in the review.

### **Data sharing**

Specific comments on data sharing are listed below.

- For the review to consider what level of expert knowledge and advice will be shared with the SG after a loss of engagement
- A general comment about covering data sharing for underpinning data cross-nationally.

### **Other**

Comments that did not align with the previous themes are listed here.

- Concern that the proposal in the consultation document that suggests any new scrutiny arrangements should cover climate change - and belief that impacts of climate change are different to environmental impacts
- A request for clarity about how the UK Government and SG will continue adhering to soft laws and guidance post EU exit.

### **Specific issues to include in the review**

- A list of three issues to include in the review: *'1) clarification of the reporting and monitoring in land ownership 2) a concern that planning applications should be required to have an Environmental Impact Statement through an independent audit resulting in positive environmental impacts 3) clarifications of the key role of communities in reporting and monitoring.'*
- Three points to review *'1) Development and mitigation for wildlife 2) Freshwater and marine water quality 3) Pesticide use and prevalence in terrestrial and freshwater ecosystems.'*
- Two issues to include in the review: *'1) commitment to non-regression from the SG 2) specific commitments on general principles and substantive revisions.'*
- A range of areas for the review to cover; *'biodiversity, protected areas, invasive non-native species, air and water quality, waste management and environmental assessment.'*
- A detailed list of areas to include in the review: *'1) distribution, trend and condition status of marine species and habitats; 2) the effectiveness of monitoring activities for informing marine planning and the roll out of marine industries and informing more sustainable fishing practices in Scottish waters; 3) wider surveillance to pick up wider threats to the marine environment, to better understand the impacts of natural effects in relation to human induced impacts; 4) long term funding arrangements for surveillance, monitoring, assessment processes and reporting with a robust system of early warning indicators (biological, chemical and physical); 5) aggregation and disaggregation of data at different spatial scales; especially to inform management measures in marine protected areas, marine spatial planning and impact assessments of activities and developments in the marine environment; 6) mechanisms and partnerships that exist for interpreting and communicating environmental data and information to a wider public audience (the science-communication or knowledge transfer interfaces).'*

- Two themes: *'1) monitoring sites to avoid pollution 2) SG agencies taking independents samples and carrying out independent monitoring of those.'*
- A list: *'Biodiversity: species abundance/distribution, etc; Representativeness, condition and connectivity of protected areas; INNS; Air, water, marine quality standards, etc; Waste; Chemicals; Procedural comparisons: e.g. SEA, EIA, access to justice, etc.'*
- For the review to include: *'digital innovation, inclusivity in terms of socio-economic factors, collaboration between agencies, meaningful reporting and monitoring.'*
- Other suggested topics included those listed below.
  - Water, waste and flood risk management and ecological status
  - Monitoring of the marine and coastal environment
  - The historic environment
  - Illegal disturbance of cetaceans by ADD's and illegal scallop dredging
  - Climate change, biodiversity, pollution, environmental degradation
  - Carbon capture, state of biodiversity, marine environment, land use and soil erosion, air pollution, waste reduction and waste management, flooding
  - environmental degradation, water quality, air pollution, habitat destruction, species population numbers of common as well as endangered species of plants and animals
  - fisheries and agriculture
  - protection and enforcement
  - ecosystem restoration.

## Appendix 9: Chapter 4, Q7

### ***Loss of legal oversight***

Discussion about a loss of legal oversight included:

- the importance of the European Commission in upholding environmental law, and that this will be lost as a result of EU exit;
- the issue of legal oversight providing incentive to take duties seriously; and
- loss of external policing bodies and mechanisms resulting in implementation failures and delays.

### ***Loss of supranational oversight***

Comments expressing concern about the loss of supranational oversight highlighted:

- spatial planning, and that the loss supranational oversight may provide an opportunity to bring the Scottish spatial planning system within the remit of a new body;
- the loss of supranational oversight could present initial problems, continued engagement with the EEA could alleviate some of the issues; and
- a suggestion that the loss of supranational oversight may result in the UK Government pushing for less control.

### ***Other***

Comments that did not align with other themes in response to this question are listed below.

- A suggestion the UK Government may impose a framework that is less robust and therefore open to interpretation
- Discussion about the importance of genuinely independent and accountable reporting to meet the accepted principles
- A view that the importance of the creation of an independent body is recognised already by the UK Government in the draft Environmental Principles and Governance Bill, and that Scotland should align
- The need for the involvement of specialist staff outside of the suggested agencies in order to deal with environmental complaints.

### ***Intra-UK considerations***

Other singular comments provided in relation to intra-UK considerations are listed below.

- A suggestion that the same level of scrutiny should exist post EU exit, especially if there is any divergence between Scotland and the rest of the UK
- That the crossover between EU and Scots law has the potential to minimise any issues
- A discussion of Scotland's devolution settlement and its autonomous nature in relation to the environment - suggested political relations between the SG and the UKG may have adverse effects on the wider devolution settlement
- A request for alternative arrangements to continue to engage with the EU
- Consideration of how the implications of how powers being returned from the EU are managed

- Discussion of matters of post EU exit governance which are not addressed in the consultation and consideration of the roles of different levels of government in the UK.

### **Examples**

Nine respondents shared specific examples in their comments.

- Two discussed the impact of the loss of EU oversight by giving an example of the UK breaching air quality standards on three occasions, and the ECJ ruling that the UKG failed to protect foraging and breeding areas for the harbour porpoise.
- There was a reflection from one respondent on aquaculture companies in Scotland that are operated by bodies outside the EU: *'an importation from Norway of salmon ova from stock that was very recently infected with anaemia, see Scottish Government FOI/18/03773. Without the involvement of the EU's Directorate General for Health and Food Safety there would have been no safeguard.'*
- One respondent said they did expect there to be significant issues and gave the example of a hare surveillance project that was not up to standard.
- There was a discussion from one respondent about the chance that a loss of scrutiny may result in a deregulation of pollution. This respondent shared an example of the farming community having low environmental standards, large landowners tolerating environmental degradation and public authorities causing pollution in towns and cities.
- One reflected on the potential role of a new watchdog and its potential to hold the UKG to account, giving the example of the 2005 ruling that the UK Government had failed to apply the Habitats Directive to plan making in all UK jurisdictions.
- An experience of fishing management within EU special areas of conservation was described by one respondent - this detailed response has been signposted to the SG for consideration.
- One suggested the SG should consider reviewing the Strategic Research Programme (2016-2021) as it contains expertise and could be helpful for arranging alternative arrangements for independent scrutiny and assessment.
- There was a discussion about loss of scrutiny and the major role the EU has played, giving an example of the implementation of the Birds and Habitats Directives. This respondent also gave the example that the EU has required the UK to implement site-specific conservation priorities and measures for all SACs, as a means to better manage these sites.

### **Positive impact**

Discussion of potential positive impacts included:

- natural capital indicators as an asset, that may place Scotland ahead of less well-developed performance monitoring information sources available through the EEA or EU; and
- a view that the replacement for EU scrutiny should have no impact, and that if alternative arrangements are implemented by the SG, it could place projects and businesses at a disadvantage.

### ***Other comments***

Comments that did not align with other themes are summarised below.

- A suggestion that the volume of cases presented to the EU Commission is not significant, therefore it may not justify the creation of a whole new body
- An explanation that a loss of scrutiny and assessment could result in a loss of momentum if it does not maintain alignment with EU protections, and reiterating the importance of adopting the environmental principles
- A reflection on EU exit negotiations and indication that EU environmental principles could be maintained if a withdrawal agreement is reached
- One respondent discussed the Aarhus Convention, noting the UK will continue to be subject to the relevant requirements of the United Nations Economic Commission for Europe (UNECE), and its Compliance Committee.

## Appendix 10: Chapter 4, Q8

### ***Expanding the role of existing bodies***

Other singular comments provided in relation to expanding the role of existing bodies included:

- limitations if the role were to be taken on by the Scottish Parliament with regards to its scrutiny and accountability functions; such as time, access to independent expert advice and resourcing and that this would only become exacerbated post EU exit; and
- a suggestion to increase the scrutiny powers of Parliament through establishing a committee equivalent to UKG's Environmental Audit Committee.

### ***A supervisory panel***

Singular comments were made in relation to a supervisory panel.

- For the creation of an independent panel similar to (Intergovernmental Panel on Climate Change) IPCC
- Questioning whether creating a supervisory panel would entail enough benefits in relation to expanding the role to existing bodies, which could require less resource
- A suggestion that the need to establish an independent supervisory panel should be assessed against the possibility of using existing agency or inter-agency resources to deliver reporting and scrutiny at least in the short term
- For oversight and/or involvement from relevant bodies such as environmental charities.

### ***Other views***

Comments that did not align with the other themes are summarised below.

- A suggestion that it would have been helpful to have comparative examples of what happens in other non-EU states referenced in the consultation paper in order to make an informed response
- A call for more discussion from the Scottish Government about this issue in an ongoing consultation process
- A brief comment indicating that this issue will need further consideration in light of future developments
- Discussion of external obligations that could affect the delivery of any new arrangements, giving the example of the 'Backstop' setting out clear requirements for environmental oversight, including powers for the responsible body to act on complaints or at its own initiative, to the potential for litigation and to the need for effective remedies - and noting that due to uncertainty, it is difficult to judge how far these should be allowed to influence the design choices currently being made.

## Appendix 11: Chapter 4, Q9

### ***Inclusion of all policy areas***

Singular comments in relation to including all policy areas are listed below.

- A suggestion that all work carried out by the SG and local councils should be scrutinised
- For a full alignment to the National Performance Framework and the Sustainable Development Goals
- A suggestion that there must be careful consideration around the scope of scrutiny arrangements so as not to exclude a potentially relevant matter - the respondent gave an example of a role that could relate to matters around agriculture which are relevant to environmental law and a limited role in relation to planning policy as it relates to areas of environmental responsibility, including Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA).

### ***Additional policy areas***

Twenty-eight respondents offered suggestions for other policy areas to include within the scope of any scrutiny arrangements. These are summarised in the table below.

<b><i>Policy Area Suggested</i></b>	<b><i>No. times suggested</i></b>
Noise pollution and light pollution	11
Historic environment	4
Agricultural	4
Spatial planning and development	3
Protected areas, marine and terrestrial	3
Wellbeing (link between societal mental, physical and emotional health and habitat quality)	3
Waste and the circular economy	3
Access to the natural environment including parks and green spaces	3
Nanomaterials	3
Pathogens	3
Land use planning	3
Citizens' rights enshrined in the Aarhus convention	3
Protection of EU and Scottish habitats and species	2
Trade (how sustainable and climate-change positive is Scotland's trade, e.g. palm oil)	2
Protection and enhancement of habitats providing numerous environmental services e.g. peat bog	2
Integration	2
Aquaculture (GM technologies, pathogens and welfare issues)	2
Forestry (impact of coniferous plantations on water quality and biodiversity)	2
Protection and enhancement of Dark Sky areas	2
Tourism	2

Genetically modified organisms	2
Landscape	2
Ecological expertise in the workforce	1
Land abuse (farming, deer stalking, goose shooting)	1
Packaging	1
Biodiversity duty	1
Sustainable management (ensuring other authorities adhere to high environmental/biodiversity standards)	1
Climate change (link between habitat quality and carbon storage, marine and terrestrial)	1
Freshwater quality (a review of priority substances needs to be made on the basis of preserving invertebrate populations)	1
Pesticide use (catastrophic influence of pesticides on invertebrate populations and subsequently higher trophic levels e.g. birds)	1
Renewables	1
Rural	1
Transport	1
Air quality (including inside buildings)	1
Food production and security	1
Soil	1
Energy policy	1
Biosecurity	1
Disease control	1
Wildlife management	1
Invasive non-native species	1
Environmental nuisance	1
Fossil fuel extraction (how it exacerbates climate change and phasing it out)	1
Incentives for eco-system restoration (reforestation and species enhancement/protection)	1
Assessing EU and worldwide changes in environmental scrutiny	1
Protection of sustainable use of natural resources (94)	1
Cultural heritage (archaeology and built heritage)	1
Planning policy and legislation (not planning process, as existing institutions are adequate in delivering scrutiny in these areas)	1
Dredging (legal and illegal)	1

### ***Reflections on policy***

Specific singular comments on policy were made as listed below.

- Discussion of the creation of a new Environment Act for Scotland and a suggestion this would allow the many and diverse issues affecting environmental quality to be embedded in domestic law

- A suggestion that broader scrutiny of Scotland’s performance against domestic environmental legislation and strategies as currently provided by Parliamentary Committees, may be further considered in terms of ensuring a proportionate and efficient oversight of Scotland’s environmental and compliance performance
- A suggestion that any new body created for scrutiny and assessment arrangements should have the powers to scrutinise how environmental principles are applied, alongside non-regression or dynamic alignment requirements in terms of UK-wide obligations or Scotland-specific commitments regarding EU environmental policy
- For a full alignment to the National Performance Framework and the Sustainable Development Goals to ensure a joined-up approach to policy
- A reflection that currently, at EU level efforts have been made to integrate environmental protection requirements including environmental principles, such as the precautionary principle, into areas of law and policy and the importance that any scrutiny arrangement considers the environmental integration principle
- Recognition that it is important to manage policy coherence for multiple benefits, particularly where there may be policy gaps, and that it is important for the approach to environmental governance to consider how different policies interact - including gaps and how policy arrangements could be improved
- The importance of cross border collaboration within any new scrutiny and enforcement arrangements, that any new body should maintain close linkages and cooperation with EU Bodies, and that if this approach is not adopted, there should be duties on each of the relevant institutions
- The monitoring of nature and biodiversity in that it is often focused of designated sites, with suggestion that it would be practical to consider how monitoring is extended to other areas.

### **Clarity**

Comments on the need for greater clarity are listed below.

- A suggestion that the list provided represents existing policy areas but that clarity would be helpful as to where or how these relate to relevant policies
- Examples of specific areas that require clarification; that nano-materials and GMOs are included, marine matters, and a need to clarify the position in relation to matters such as agriculture, forestry and planning, where there is a clear environmental dimension to some, but not all, aspects of the area
- Utilising a definition of the environment that covers all environmental legislation and requirements - and concerns about the approach to scoping taken in DEFRA’s Draft Environment Bill, principally the deliberate exclusion of climate change from the remit of the Office for Environmental Protection (OEP) and the purported omission (according to the explanatory notes) of planning - and that clarity must be provided about the jurisdictional remits of both proposed Scottish arrangement and DEFRA’s proposed OEP
- Clarification on how far planning falls within these arrangements as this could provide an opportunity to hold all jurisdictions to account for the design and policies of planning systems
- A suggestion that it would be helpful to clarify: 1) that the SEA is specifically included in the ‘environmental impact, access to environmental information and

environmental justice' policy area 2) and that 'water environment and flooding' includes water quality and water resources.

**Other**

Points that did not align with the other themes discussed in response to this question are listed below.

- A discussion around aquaculture and a request for cost-effective regulation by ensuring those who operate in Scotland's waters subsidise the cost of regulation. The respondent suggested that the cost of carrying out the research needed to provide the 'scientific scrutiny' required by the precautionary principle should be included in that subsidy
- An offer of support to the SG in the creation and development of the scrutiny framework
- A discussion of the wider issue of alignment and interpretation of EU law and policy, with a suggestion that this is a political decision and depends on whether Scotland considers itself an environmental world leader
- Support for the inclusion of matters relating to climate change, as many environmental issues which are not primarily about climate nevertheless impact climate. This includes a published understanding with the Climate Change Committee on how it will work in collaboration with the new arrangements to avoid duplication.

## Appendix 12: Chapter 5, Q10

### ***Mitigating actions***

Singular comments on actions which would mitigate the loss of the EU complaints mechanism are listed below.

- A suggestion that citizens and organisations have an important role in environmental protection and decision making, and so could benefit from an accessible domestic forum to achieve this same level of contribution
- A suggestion that the SG should consider the establishment of a specialist environmental court or tribunal as the best way to address environmental governance in relation to loss of EU mechanisms and compliance with the Aarhus Convention
- For a Scottish Ombudsman for Ecosystem Health to be empowered to investigate complaints by citizens, acting on behalf of aspects of nature, or possibly whole ecosystems, where there is deemed to be injustice, damage or hardship as a consequence of maladministration
- For domestic complaints to be successful, there must be penalties for non-compliance to incentivise authorities to comply
- That consideration be given to the Aarhus convention, in relation to expenses rules as currently they do not ensure that relevant private law claims can be covered by Protective Expenses Orders and therefore potential litigants do not have the required certainty nor the guarantee against prohibitive expense.

### ***General discussion***

Comments which did not align with the other responses, but formed part of a general discussion on the question included:

- a discussion around lack of access to information and justice in general, and that the loss of complaint mechanisms would contribute to this;
- a view that there will be no impact of the loss of EU mechanisms, indicating that the current arrangements do not benefit the environment; and
- the obligations on the UK as party to the Aarhus convention, and that this stipulates the right to access justice in environmental matters and public participation in that, and that this might mitigate the impacts of loss of EU mechanisms.

### ***Examples***

Eleven respondents shared specific examples for the SG to consider in relation to impacts of the loss of EU complaint mechanisms. These included reflections on recent cases considered by the EU complaints mechanism, or participants' direct experiences of engaging with complaints processes.

### ***Other***

Comments in response to the question which did not align with other themes are listed below.

- That Scotland would be capable of handling complaints without EU mechanisms
- To view the situation as an opportunity to ensure projects critical to the climate change agenda, such as achieving net zero carbon emissions by 2045, are supported through any new mechanisms.

## Appendix 13: Chapter 5, Q11

### ***The functions of any new model/body***

There was a call for the functions of the EC and the ECJ to be maintained post EU exit and an observation that this function should not have the ability to hold businesses to account, as this would replicate existing functions carried out by agencies such as SEPA.

### ***General reflections***

Other singular comments which reflected on the need for a new function included those listed below.

- A reflection that thus far, there have been few EU complaints relevant to Scotland, and that the Scottish environmental regulatory process currently provides mechanisms to make representations on regulatory decisions to regulators, and a suggestion that the remit of current mechanisms could be extended
- A suggestion there will be a loss of coherence post EU exit in the options available to those complaining
- A query as to whether Part 2 of the Localism Act is to be phased out, replicated or absorbed by any new body, as it is currently enforced that any EU infringement fine will be passed on to the council concerned
- A detailed example shared by one respondent of their experience and the difficulties of proceeding with a judicial review
- A brief example of a situation in which it would have been difficult to share information with a new body and suggestion that a panel of experts or commission could be established.

### ***Resources***

Comments included a suggestion that existing organisations could pool their resources to ensure implementation costs are minimised, which did not fit within the other responses mentioned under this theme.

### ***Other***

Singular comments that did not align with the themes analysed in response to this question are listed below.

- The SG should carry out a consultation on the establishment of a new function/model/body
- For the consultation paper to include a comparison to the mechanisms in place in other non-EU states.

## Appendix 14: Chapter 5, Q12

### ***Discussions around the governance / enforcement gap***

In relation to these discussions one respondent noted that enforcement powers are necessary to complement a complaints process.

### ***Lowering / weakening of environmental standards.***

One respondent commented that failure to enforce standards is already an issue, and that this will worsen further if another layer of enforcement is removed.

### ***Environmental damage***

There was a general comment on the value of the Scottish landscape and seabed, implying that this will be damaged.

### ***Other negative impacts***

Singular comments which discussed negative impacts included that environmental criminal activity will increase, that there will be more unreported incidents of pollution, the potential for difficulties for businesses if the regulatory environment is no longer clear and that there is a risk that Scotland will not meet its ambition to be a leader in environmental governance.

### ***Impact of fines***

One respondent commented that financial penalties could have negative consequences by acting as a barrier to remedial action (at a time of limited resource).

### ***Resourcing***

There was a general comment about enforcement requiring greater resource and that resource will be reduced.

### ***Other comments***

Other comments that did not fit the themes for this question or align with the other responses are summarised below.

- Of those who indicated there would be a negative impact and gave a detailed response, one stated that Scotland needs to emphasise that environmental harms are unacceptable and protection comes before development, and one made a general point that, in spite of the small number of EU enforcement actions, there needs to be greater resourcing of enforcement being carried out across Scotland.
- Other specific comments including one discussion of the experience of the fishing industry in Chile, the perception of the damage being caused by the fishing industry in Scotland, the use of the UK Marine and Coastal Access Act (in relation to the potential remit of the OEP), the availability of more environmentally friendly technology which is not used due to greater expense and air quality targets not being met.

## Appendix 15: Chapter 5, Q13

### ***An independent body or 'watchdog' and its powers***

In terms of roles as a scrutiny body, the following suggestions, which did not align with the main discussions under this theme, were shared by a small number of respondents.

- Scrutinise the Government's allocation of resources across environmental functions in the public sector
- Report to Audit Scotland and the Public Audit Post Legislative Scrutiny Committee (PAPLS)
- To work across SG divisions as a multi-parliament body that also engages across UK jurisdictions
- Provide oversight to measure progress
- To develop policy
- To establish a set environmental goals, targets and standards, linked to clear timeframes
- The need to oversee the workings of current regulators
- Publish reports
- The need to have sufficient reach to act as a deterrent.

Other points for consideration in the creation and management of a new body discussed across the consultation included:

- the need for a new body to have the necessary capacity and (scientific and technical) expertise; and
- a suggestion that any new arrangement should not duplicate the roles of local authorities or other expositing public bodies.

One respondent argued for the creation of two bodies - one dealing with policy/regulatory matters and guidance and another dealing with enforcement.

### ***An environmental court or tribunal and its functions***

Other singular reasons given for the creation of an environmental court included:

- signalling the importance which the Scottish Government places on the issue; and
- being appropriately detached or independent from public bodies, government and parliament.

Singular suggested functions or powers for the court included:

- being guided by the four principles (and any others including access to environmental justice); and
- judges / panel being relevant experts where possible, across a range of areas such as ecology, climate change and land use.

One respondent made a specific point that the court could be created by extending the remit of the Scottish Land Court which already has many of the strengths of Environmental Courts in other jurisdictions (including lay experts, lower costs to litigants, an inquisitorial approach and the use of written submissions to focus court time and resources on the most important legal points) and noted that it already acts as a de facto Environmental Court in certain appeals.

### ***Other suggestions for models / arrangements***

Suggestions for models or arrangements included continuing with the current domestic system, expanding the proposed Office of Environmental Protection in England to Scotland in some capacity, and co-ordination of existing agency resources across the UK.

Other comments included:

- a suggestion that agencies such as Scottish Natural Heritage and Scottish Environment will have important roles in monitoring, ensuring compliance and reporting; and
- that there is a need to have a mechanism where the Scottish Government and public bodies can be questioned and that an efficient domestic monitoring and enforcement system needs to be established.

### ***Possible limitations of approaches***

When discussing potential approaches, a number of singular comments were provided which did not fit with the other themes of limitations provided in response to this question. These are listed below.

- That a review of the domestic judicial system is likely to be costly, bureaucratic and would not necessarily result in any significantly better outcomes
- That judicial review is not always a satisfactory solution
- A suggestion of a potential role for the UK Supreme Court but that this 'may be a sledgehammer to crack a nut'
- The limitations of extending the proposed OEP to Scotland given the unique characteristics of Scotland's environment, infrastructure and legal system
- The proposed OEP for England falls short of replicating the current EU structures and that Scotland would need to go further than this
- The potential role of Parliament in holding government to account but that there is a danger of the Parliament being unduly deferential to the government
- That any new independent body should have the authority to refer to a cross-national council and suggesting the model of an environmental court
- That at a UK level the Joint Nature Conservation Committee presently decides on disputes but there may be a case for a specialist environmental dispute resolution mechanism to provide sufficient expertise.

### ***New enforcement powers***

Singular comments given in relation to enforcement powers are listed below.

- The need for a 'credible final stage of enforcement' including the ability to impose interim measures and seek remedy and restoration
- A request that the same breadth of policy areas is subject to scrutiny as is currently the case with the EU
- The need for 'properly administered environmental laws by a competent and knowledgeable judiciary'
- The need for appropriate deterrents / penalties to reduce non-compliance
- The need to fill the enforcement gap, but in a proportionate way
- A specific point that: *'Any new enforcement approach should aim to discourage environmental damage or loss in the first place, allow maximum opportunity for*

*restoration where this is practical (rather than simply imposing financial penalties) and represent an effective deterrent to similar cases occurring in the future.'*

### **Other comments**

A number of respondents made general comments which did not align with the other themes highlighted in response to this question. These are listed below.

- A call that: *'appropriate emphasis is placed on incentivising appropriate environmental outcomes to minimise the potentially enormous costs of infraction.'*
- The need to ensure that existing rights are not being diminished: *'It must be made clear that the public and civil society are not prevented from pursuing enforcement action just because related matters are currently being considered by the new body.'*
- For consideration to be given to how there could be personal accountability for those in charge of public authorities where there are clear failings to meet environmental obligations
- Given that environmental law has its basis in international agreements, there may be value in incorporating monitoring and scrutiny arrangements for those into domestic law
- A suggestion that legislation needs to have binding long-term objectives to protect and recover biodiversity, prevent water pollution and improve quality and tackle air pollution
- A specific request to the Scottish Government to consider and tackle current obstacles to access to justice for the public, including environmental NGOs, to strengthen private enforcement of enforcement law and its underlying principles - the same respondent noted their research on this topic and its potential to contribute to the Scottish Government's work
- The view that: *'enforcement is a far greater issue which demands national, and supra-national action, with independent oversight'*
- A comment that people in Scotland should be employed to do the job
- A comment that it will be 'liberating' to be out of an arena where there are competing national interests.

## Appendix 16: Summary of consultation questions

### Chapter 2:

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

### Chapter 3:

- Question 5: What do you think will be the impact of the loss of engagement with the EU on monitoring, measuring and reporting?
- Question 6: What key issues would you wish a review of reporting and monitoring requirements to cover?

### Chapter 4:

- Question 7: Do you think any significant governance issues will arise as a result of the loss of EU scrutiny and assessment of performance?
- Question 8: How should we meet the requirements for effective scrutiny of government performance in environmental policy and delivery in Scotland?
- Question 9: Which policy areas should be included within the scope of any scrutiny arrangements?

### Chapter 5:

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

### Chapter 6:

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



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This publication is available at [www.gov.scot](http://www.gov.scot)

Any enquiries regarding this publication should be sent to us at  
The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-83960-177-4 (web only)

Published by The Scottish Government, September 2019

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS638262 (09/19)