Friends of the Earth Response to Consultation:

Strenthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland

Elaine McCall
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Dear Ms McCall

Strengthening Enforcement of Environmental Law

Friends of the Earth Scotland (FoES) is an environmental charity founded in 1978 and an independent member of the Friends of the Earth International network. We undertake research, advocacy and community development activities throughout Scotland in pursuit of environmental justice and sustainability.

FoES is pleased to respond to the above eagerly and long-awaited consultation. We ask that the following points and information are reflected in the resulting strategy.

We welcome the sense of intent demonstrated by the publication of this consultation. However we have been somewhat disappointed by the lack of ambition in its contents which are limited by a narrow and in some respects misplaced scope; an approach which focuses on the difficulties of certain options, rather than their potential benefits; and a failure to advance alternative positive proposals.

On scope, whilst respecting the importance of duplicating effort, the exclusion of certain regimes (such as agriculture), and the ignoring of others (such as building regulations) means that opportunities to learn from different regimes and to maximise the benefits from improved enforcement are put at risk. For example it appears that enforcement of energy standards in building regulations is so poor that as many as half of all new buildings fail to meet standards, putting Scotland's progress on meeting climate change targets at risk.

We are also concerned that the scope of the proposals implicitly deprioritises civil and administrative aspects of environmental law, in comparison with environmental crime (for example in the consideration given to environmental courts there is no analysis of the potential role of an environmental court in civil or administrative law). In finalising a strategy, and developing an implementation plan, the Scottish Executive should revisit the analysis presented here to ensure that all aspects of environmental law are addressed and that both criminal and civil/administrative matters are dealt with fully.

FoES welcomes the initiatives already taken by the Executive to enhance enforcement of environmental law (para 1.11), but remain convinced that there are outstanding opportunities to better use environmental regulation, not only to enhance environmental outcomes, public health and social justice, but also to incentivise environmental innovation in Scotland's businesses thus enhancing our economy

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too. It is profoundly unhelpful to represent regulation and enforcement as a cost to businesses and the economy.

Moreover, we are concerned at the limited evidence presented of the successful outcomes from current initiatives (para 1.12), which does little to ease our concern that sentences and fines remain too lax to operate as a serious disincentive.

We broadly endorse the enforcement pyramid (figure 1) and the proposed principle (para 1.17). However we would note that the pyramid is clearly primarily relevant to licensed activities, and complementary approaches will be needed to address activities carried out without a licence or simply in breach of environmental rules. In addition we would suggest that there is no need to separately identify the business sector as stakeholders under principle 8, whilst principle 9 should read 'ensure compliance with' rather than simply 'be mindful of' our relevant international obligations.

Detailed response to consultation questions
The answers given here should be read in the context of the general comments offered above.

Question 1 - compliance assistance - operator awareness

1.1 Do you think that there is a need to improve operator awareness of environmental law?

YES

Note that "operator" is too narrow a term, as it tends to imply someone responsible for an industrial or commercial operation. All those responsible for compliance with environmental law – whether operators, land managers, fishermen, householders, the public exercising their rights of access or public bodies implementing their administrative responsibilities – need improved awareness.

1.2 If you said "YES" to question 1.1, - please give us your views on how improvements can be achieved.

FoES believes that there is a prima facie case to suggest that increased enforcement rates and tougher sanctions - reported in the media will both have a beneficial effect on awareness, and enhance compliance. While we agree that enhanced awareness in the abstract may not feed through to enhanced compliance (para 2.10) we believe this is fundamentally because current sanctions do not provide a strong enough incentive, whether financially or socially.

1.4 Do you think that there is a need to evaluate the provision of advice to operators in terms of its impact on compliance rates?

YES

1.5 The Scottish Executive would welcome any further views that you may have on operator awareness.

Ignorance is no defence. Lack of operator awareness must not become a reason not to enforce.

Question 2 - compliance assistance - management systems for improving compliance

2.1 Do you think that the promotion of formal compliance plans and systems, such as EMS, should be increased?

NOT generally, but with respect to specific systems which embody meaningful targets and verification.

A discriminatory approach, which recognizes the failure of generic EMSs to deliver improved performance, is essential. Research into European industry by the Measuring Environmental Performance of Industry (MEPI) project found that businesses with EMSs did not perform appreciably better than those without (Berkhout et al 2001). Regulatory agencies, appropriate professional bodies, trade associations and NGOs must promote only those EMSs which include mandatory target setting (such as EMAS) and effective independent verification.

For such systems support with gap analysis and a step-by-step approach might be merited. Other EMSs including the ISO14000 series carry too great a risk of 'greenwash' and are not worth public investment

to support them. Publicity by SEPA of good and bad practice with EMSs would help operators distinguish the relative value of the different systems.

Question 3 - Advice, guidance and training for Enforcing Authorities, the Police, Procurators Fiscal, Sheriffs and Judges

3.1 The Scottish Executive would welcome any comments you may have on this topic.

We are concerned that the consultation merely asserts a successful outcome from recent training initiatives without providing any evidence to back up that claim. More generally, in terms of outcomes (enforcement rates, compliance rates), advice, guidance and training alone is not sufficient. Some issues are the result of inadequate resources or understaffed agencies. The consultation paper fails to recognise this even as a *potential* issue.

Question 5 - risk based inspection regimes

5.1 Do you think that there is a need to adjust inspection regimes so that they place greater emphasis on a more formal and analytical risk based approach?

YES – but this must not comprise the only strategy used to inform inspection regimes. In particular, action is urgently required to enable and enhance community reporting of suspected breaches of environmental law. Friends of the Earth Scotland's projects working with communities facing local pollution and planning problems have consistently found that there was very limited support and encouragement from regulators and local authorities to support and encourage community reporting. In particular, evidence from communities is often dismissed as anecdotal, or inadequately documented and demonstrated. Meanwhile, enforcement officers are often unavailable out-of-hours to verify community concerns about issues such as breaches of working hours at minerals operations.

We are gravely concerned that this consultation scarcely mentions community reporting, fails to offer any evidence on its current incidence, and fails to offer any significant proposals to encourage it in the future (notwithstanding the brief consideration of hotlines in paras 2.136ff). In our view this will mean that it remains marginal as communities continue to feel actively discouraged from engaging with regulators when they have complaints. We are aware that many staff in SEPA actually welcome community complaints, because they recognize the regulator's limited monitoring capacity. However they often do not communicate this enthusiasm to communities, because of the remote likelihood that they will be able to deliver visible results, such as a prosecution.

5.2 Is research necessary into options for risk based models

YES

5.3 Is evaluation of compliance effects of risk based models required

YES – indeed it is essential to justify the approach

Question 6 - financial administrative penalties (imposed by Regulators)

6.1 Do you think there is a case for exploring the potential of regulator/enforcing authority-imposed financial administrative penalties for environmental and wildlife offences?

YES

6.2 If regulator-imposed financial administrative penalties were introduced - do you think it would be best to:-

☐provide in law that specific offences can attract an administrative penalty
☐empower regulators to determine when a financial administrative penalty should apply in accordance with an agreed code or guidelines
✓a hybrid of both of these options

6.3 If enforcing authorities and regulators were to have the facility to impose financial administrative penalties for environmental and wildlife offences - what form should they take:-

☐fixed

□variable
✓mixture of fixed and variable depending on the offence

6.4 If financial administrative penalties were to be variable, which of the following components should be factors in determining the level of the penalty (you may tick more than one box):-

1. ✓seriousness of offence.
2. ✓remediation costs (restoring the area to its previous state).
3. ✓compensation costs (restoring the area to a better state than before).
4. ✓recovery of any financial gain resulting from non compliance.
5. ✓profit/turnover of the offending operator.
6. ✓unpaid licence/permit fees
7. ✓costs to the Regulator relating to enforcement activity on the case.

6.5 The Scottish Executive would welcome any further views that you may have on financial administrative penalties.

FoES welcomes the consideration given to financial administrative penalties. However we are disappointed that they are only being advocated to address the gap between warnings and court action. The scope of administrative penalties to provide a sanction that is proportionate to the benefits obtained as a result of the breach (cf civil penalties in Competition Law), or proportionate to the costs of restitution, means that consideration of a much broader civil penalties regime would be merited. This would help fill the much larger gap we see at the top of the enforcement pyramid where current sanctions remain inadequate to incentivise compliance. Recent examples of relatively small fines imposed on UKAEA and Scottish Water reinforce the perception that, in these cases, 'crime pays'.

Question 7 - new additional sanctions imposed by a court

7.1 Do you think that there is a need to explore the potential of alternative court-imposed sanctions for environmental and wildlife criminal offences?

YES

We are convinced that current sanctions do not adequately incentivise compliance. We would urge the Executive to therefore make a firm commitment to develop additional and tougher sanctions, and having done so, to explore the detail of how best to fulfill that commitment. In particular we would support measures to allow Courts to complement existing sanctions with measures to require actions or payments to remedy damage done by the breach of law.

Question 8 - environmental court

8.1 Do you agree that the case for an environmental court for Scotland is not made out?

NO

The analysis and consequent conclusions in this chapter of the consultation is seriously superficial and misdirected. We believe that a strong case remains to suggest that a specialist court may be the most effective (if not the only) way to deliver both enhanced enforcement – especially in civil and administrative matters - and access to justice. The arguments presented in the paper do not address this case.

The most fundamental error is that it focuses almost entirely on criminal matters. By contrast, the various comparative analyses cited examine Environmental Courts or similar in relation to civil and administrative matters. Indeed, in other jurisdictions (those quoted but also in the US and Canada), it is evident that environmental courts rarely have responsibility for criminal matters – these rest with "ordinary courts". However, while criminal matters may best remain with "ordinary courts", there is a clear case – demonstrated by the data presented in the consultation (e.g. on fly tipping, and on EA and SEPA prosecutions) – for much more vigorous enforcement and tougher sanctions. The paper's conclusion that there is 'insufficient evidence' to support concerns regarding fine levels is not justified by the evidence presented. The figures have been presented – whether by oversight or intentionally – in a way which reduces the apparent gap between EA and SEPA average fines. Recalculation on a consistent basis would show that the gap is highly significant.

Such a conclusion does not undermine the case for a specialist environmental court for civil/administrative matters. It is regrettable that the paper fails to make any such analysis, and instead creates a series of 'straw-man' arguments against environmental courts. These arguments neither account for the potential benefits nor offer constructive alternatives. FoES accepts that in certain respects – such as to ensure compliance with the Aarhus convention – procedural changes such as new rules of court to apply in environmental matters may be a feasible alternative. But we do not accept that the status quo is a viable option.

Taken together, the sections on an environmental court and on dispute resolution/appeals appear to suggest that the case for a specialist body has not been made. This contrasts sharply with the Macrory and Woods (2003) conclusion for England and Wales – and the justification appears to be solely that Scotland is not England and Wales! That is indeed so, but the evidence to suggest that Scotland is so different to England and Wales (and, indeed, to the US State of Vermont, a number of Canadian Provinces, a number of Australian States, New Zealand, Ireland, Denmark and Sweden) is not provided or, where put forward, is misleading.

For instance, in para 2,108 it is claimed that the special features listed by Macrory and Woods are not unique to environmental law. If this is the case, why not propose abolition of the Land Court? The land and environmental issues dealt with by the Land Court are dealt with by that specialist body, precisely because they have special features that require a specialist response. Secondly, "the fragmenting of the judicial system to accommodate a myriad of specialist courts" can only be relevant to criminal matters, given the existence of the Land Court and no proposal for its abolition. Moreover, the consultation then takes a directly contradictory stance in para 2.116 to argue against an environmental tribunal. Sadly, one can only conclude from such internal contradiction that here the consultation seeks to defend the status quo regardless of where the best outcomes for the environment can be achieved.

The penultimate reason given in para 2.108 against an environmental court (that referring to the Aarhus Convention) is based on the discussion presented at paras 2.105-2.107. This states that a party to an environmental dispute or administrative decision etc should have "access to a review procedure before an **independent court of law or another independent and impartial body**". Clearly, a suspect in a criminal case has this right and the Aarhus Convention is irrelevant in the consideration of criminal matters (thus, the argument, if valid, should be in the dispute resolution/appeal section, in any case). However, for many civil and administrative matters no such right exists at present – at least, not in the "equitable, timely and not prohibitively expensive" manner required by the Convention. At present, the only such right is Judicial Review and while the Convention permits certain forms of Judicial review as compliance, there are few or no proposals, as yet, to amend Judicial Reviews to ensure that it is "equitable, timely and not prohibitively expensive" and, most importantly, is able to "challenge the substantial [as well as] procedural legality of any decision". Without bringing forward proposals to address these issues, the Executive cannot imply that Aarhus Convention concerns will be "addressed through procedural rather than structural change". Such an approach maybe adequate – but the consultation doesn't demonstrate this, because it fails to set out any substantive proposals.

Various arguments are made in para 2.121 against the case for structural change. Most of these relate to caseload, cost-benefit comparisons and lack of evidence. These conclusions take the form of a self-fulfilling prophecy and are, therefore, insubstantial. For instance, by limiting the scope of this paper to exclude such an array of matters impacting on the environment, it is perhaps unsurprising that the number of cases is small. If relevant appeals to Ministers, the Land Court or Sheriffs were to be included, the numerical caseloads would be very different – and the cost-benefit of reform would also be very differently balanced.

In conclusion, we accept that the case for a specialist court on environmental <u>crime</u> may not be made. However, the same is not the case for <u>civil/administrative matters</u>, including dispute resolution and appeals. In these areas, the paper provides a seriously superficial, flawed and misdirected analysis – seeking to address issues with minor changes functions or procedures. These might improve matters, or indeed solve all problems, but the paper does not demonstrate this, nor rebut the case for a specialist environmental tribunal/court. Indeed, it appears to overlook the fact that, with its new environmental responsibilities, the Land Court might be considered to be a '*proto-environmental tribunal/court*'. Given this, and the recent decision to add certain appeals to the Land Court's responsibilities, a full analysis should, to justify the conclusions reached here, explain why these decisions were erroneous/exceptional, and/or propose their reversal.

We therefore recommend that, before finalizing any strategy or implementation plan, the Scottish Executive re-visits this part of the paper and invites relevant stakeholders to engage in a deeper debate on this aspect of environmental governance.

Question 9 - environmental dispute resolution (appeal mechanisms)

9.1 Do you agree that there is a need for simplification and rationalisation of the environmental appeals systems in Scotland?

YES

9.2 If simplification/rationalisation was taken forward - do you agree that structural change is not the best way to achieve these aims and that, therefore, the case for a specialist environmental tribunal is not made out?

NO

9.3 If simplification/rationalisation were to be taken forward - do you agree that procedural and/or functional change is the best way to achieve these aims?

NO

9.5 The Scottish Executive would welcome any further view that you may have on the environmental appeals systems in Scotland.

FoES considers the issue of dispute resolution and appeal mechanisms cannot be disassociated from the issue of considering an environmental tribunal/court for civil/administrative matters. As the latter has not been adequately addressed in this paper (see question 8), we believe the issues of simplification/rationalisation and of procedural/function change cannot be addressed alone. In our view the tribunal model would be the simplest and most effective for businesses involved in such appeals, as well as for NGOs.

Question 10 - environmental dispute resolution (alternative techniques)

10.1 As a general principle, do you think that mediation has a role to play in the settling of environmental disputes?

YES – subject to this being an issue considered by the wider debate on environmental governance suggested above.

Question 11 - public participation - recognition, reporting and remediation

11.1 Do you think that the level of public participation in the recognition and reporting of environmental and wildlife crime needs to be improved?

YES

11.2 If you said " **YES", to question 11.1**, please give any suggestions you may have for how improvements should be achieved.

In our view it is essential to recognize the unique position of neighbour communities in the context of, for example, polluting facilities or minerals operations. Such communities can be significantly disadvantaged, and merit education and support (particularly via trusted intermediaries such as NGOs), including funding, training and capacity building to enable effective participation and use of tools such as Good Neighbour Agreements (introduced in the Planning Act 2006). (See also our comments on question 5.1)

11.3 Do you think that the level of public participation in decisions regarding the remediation of environmental damage needs to be improved?

YES

11.4 If you said " **YES", to question 11.3** please give any suggestions you may have for how improvements should be achieved.

As above (see comments on question 11.2)

Question 12 - public participation - access to review

12.1 Do you think that the possibility of increasing the role of the Sheriff in reviewing certain decisions relating to environmental law should be explored further?

YES – subject to this being an issue considered by the wider debate on environmental governance suggested above. We do not believe this alone will be in any sense adequate to address the outstanding issues here.

Question 14 - any other issues or comments?

14.1 The Scottish Executive would welcome any other comments that you may have in relation to the enforcement of environmental law in Scotland.

We remain unconvinced that formal compliance with the Aarhus Convention will be delivered by the current proposals. We are particularly concerned at the implication that the anticipated EU directive to transpose and extend access to justice requirements will not require further change in Scotland. We do not believe the current measures provide adequate scope (as noted above under 8.1), and in particular that current rules for Judicial Review do not comply on several counts (not timely, not, affordable and not merits based). **At an absolute minimum changes in the Rules of Court for such actions in environmental matters are urgently required to ensure compliance.** Moreover current procedures do not address the requirement for scope to challenge the failure of a public body to take appropriate action (such as a failure to prosecute).

Please don't hesitate to contact me if you require any further information

Yours sincerely

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Friends of the Earth Scotland