

Our Ref: Ecocide (Scotland) Bill

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Edward Mountain MSP
Convener
Net Zero, Energy and Transport Committee
The Scottish Parliament,
Edinburgh

By email only to: netzero.committee@parliament.scot

Dear Mr Mountain

Ecocide (Scotland) Bill

I write in response to the request by the Committee for views or evidence from East Ayrshire Council in connection with the above Bill. Within the letter of 11th November, the Committee has asked questions around a number of areas including consented or licensed activities, decision making and liability, thresholds of harm, cumulative impacts and enforcement and investigation.

Our comments and views around each of these specific matters is set out below under each corresponding heading from the letter. This response is primarily focused on Planning related matters as that appears to be the key thrust of the questions however it does also address Environmental Health and legal interests, particularly around the enforcement and investigation element of the questions.

Consented or licensed activities

The Council considers that it should contain such clarity. The issuing of consents and permits are usually done following rigorous exploration of all the potential impacts that could occur and will have mechanisms built in to mitigate as much harm as possible. For developments that are already more likely to have the potential for significant environmental impact, an Environmental Impact Assessment is required and such a document would thoroughly assesses the potential significant effects and how these can be mitigated. Such mitigations are

usually then built into any consent or license. Criminal liability for a public body in such circumstances should only reasonably come about if the consent or licence issued was done recklessly and without regard to securing the reasonable mitigations. Public authorities should be able to reasonably rely on the expectation that developers and organisations will operate in compliance with their permissions. Where they do not, this should not place criminal liability on the public body.

It is also important to note that the decision making structure is one of balance in relation to planning permissions. It is often inevitable that some environmental harm will come from large scale development. That does not mean that such development should be refused, but rather a wider planning balance needs to be engaged. It would seem unlikely that, on application of that balance, a proposal would be consented that would meet the definition of 'severe environmental harm', however properly understanding the risk to a decision making body and others is important as this could affect the decision making balance, as touched on below.

It is therefore considered to be critical that the Bill clarify the circumstances where criminal liability for ecocide could occur where permissions and licenses are in place.

Decision-making and liability

The potential for criminal prosecution is likely to have an effect on decision making. It will inevitably make decisions makers more wary of approving a development that has environmental harm, let alone 'severe environmental harm'. Linking to the above, absolute clarity of the circumstances where a public body could face criminal conviction will be critical to reducing the potential for a complete risk averse position being taken by decision makers. Some adverse environmental effects are acceptable from development, and it is important, subject to proper scrutiny and understanding of such effects through the planning decision making processes, that such a position continues.

The reference to cumulative impacts within this section of the Committee's letter is particularly noteworthy, and is also touched on below. Most developments will likely not approach, or be capable of approaching, the potential for ecocide and on a stand alone basis, should not trouble decision makers, even with overarching potential for criminal prosecution. However, many developments may make small (comparatively) contributions to wider regional or national type adverse effects. These wider effects, taken together, may be argued to meet the definition of ecocide. The obvious example of this is developments that will result in increased carbon emissions. As a stand-alone development, a specific proposal may not be of any notable impact on a wider scale but taken together with other developments in the time of a nationally declared climate emergency, it could be argued that it contributes to ecocide. Flooding could perhaps be another similar example. Where there is uncertainty on how cumulative

environmental impacts could be viewed and how any single development contributes to that in terms of whether the matter could be considered ecocide, the possibility of criminal prosecution is likely to feature prominently in decision makers minds and could result in an overly cautious approach to approving developments.

Threshold of harm

These thresholds are not sufficiently clear. If carbon emissions are taken as an example, the release of these during construction or operation could be seen as contributing, even in a small way, to serious adverse effects such as global warming and climate change. Those effects are widespread (regional/national/global) in effect. That would appear to meet the definitions, even if the contribution is very small compared to the regional/national/global position. Where an event is stand alone, specific to the development, the definitions seem to be workable (for example a release of chemicals to a drinking water reservoir) however it is less clear where cumulative or less tangible impacts are concerned, such as carbon emissions.

Cumulative impacts and course of conduct

This has been explained in some detail above, but it is considered that the Bill is unclear on how it applies to incremental harm and contribution to cumulative effects. Development that may have an adverse climate change effect, however small, but in combination with a wider collection of developments at regional, national or global scales, could likely meet the current definition. This will make consenting functions within Planning more difficult, as the concerns expressed above are likely to come into play. It may be useful to clarify how the Bill addresses cumulative impact and the part that any single development plays in a potential ecocide event, particularly in respect of less tangible effects like emissions.

Enforcement and investigation

The Council has concerns about the investigation and enforcement ramifications of the Bill. We consider that the Bill and any associated guidance needs to clearly set out enforcement responsibilities and who this should fall to in the event of an ecocide type incident. If the Council was required to investigate or enforce ecocide matters, this would in the first instance most likely fall to our Environmental Health services. In our opinion, that service does not have the resource to do so, given that this would add to the range of existing legislative obligations they are required to meet. Additionally, an ecocide type event is likely to require particular skills that are unlikely to be held within local authority. If there is an expectation that a local authority would be involved in such investigation and enforcement as new duties, then significant further financial investment would be required to increase the capacity and skills of that service.

On a final matter in respect of enforcement and investigation, the Council considers that if it was required to investigate and potentially thereafter enforce against an ecocide incident, then there could be a conflict of interest created. In such a scenario, the Council would be investigating and enforcing against an impact or event that may result in the prosecution of itself, given the Council's role as Planning Authority. In summary, the general principle of investigating and enforcing against itself, as the decision maker for the consent that potentially enabled ecocide, could be a clear conflict of interest. This may be a matter that the Committee wishes to consider in respect of the appropriate enforcing authority for an ecocide incident.

I trust that the above responses to the questions posed by the Committee are found to be useful. If you require any further information or clarification on these matters please do not hesitate to contact me.

Yours sincerely,

David Wilson
Interim Development Management Manager