

Citizen Participation and Public Petitions Committee

6th Meeting, 2021 (Session 6), Wednesday 3
November 2021

PE1895: Mandatory accountability for
NatureScot's decision making procedures

Note by the Clerk

Petitioner Gary Wall

**Petition
summary** Calling on the Scottish Parliament to urge the Scottish Government to make it mandatory for NatureScot to explain its conservation objectives in decision making within the framework of the Scottish Regulators Strategic Code of Practice and Scottish Government's guidance, 'Right First Time'.

Webpage <https://petitions.parliament.scot/petitions/PE1895>

Introduction

1. This is a new petition that has been under consideration since 23 August 2021.
2. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe A**.
3. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected not to collect signatures.
4. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe B** of this paper.
5. A submission has been provided by the petitioner. This is included at **Annexe C**.

Scottish Government submission

6. In its submission, the Scottish Government states that NatureScot was formed in 1992 as Scottish Natural Heritage (which remains its legal identity).
7. NatureScot is Scotland's statutory nature conservation body and advisor to the Scottish Government on all aspects of nature, wildlife management and landscape across Scotland.
8. The Scottish Government states that NatureScot works with the Joint Nature Conservation Committee and equivalent bodies in England, Wales, and Northern Ireland to ensure a consistent approach to nature conservation throughout the United Kingdom, including in relation to fulfilling its international obligations.
9. The submission goes on to explain that NatureScot is classified as a Non Departmental Public Body (NDPB). Key elements of the NDPB accountability and governance framework include:
 - The Public Finance and Accountability (Scotland) Act 2000, including appointment of a statutory Accountable Officer;
 - The Scottish Public Finance Manual (SPFM), which includes detailed governance, accounting and reporting requirements;
 - Individual public body founding legislation, which sets out delivery of statutory functions;
 - The duty to lay audited annual reports and accounts before the Scottish Parliament;
 - Framework Documents;
 - Delivery of agreed corporate and operational plans; and
 - Monitoring and reporting arrangements agreed with the Scottish Government Sponsorship Team.
10. In terms of accountability, the submission outlines the role of NatureScot's board in providing leadership, direction, support, guidance and challenge to ensure NatureScot delivers functions in accordance with the aims, policies and priorities of Scottish Ministers and founding legislation.
11. The submission notes that NatureScot operates by delegating decision-making and delivery of functions and responsibilities to the local level to ensure that they reflect local circumstances.

12. The Scottish Government submission notes that licensing decisions are delegated under the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats, &c.) Regulations 1994 to SNH (Scottish Natural Heritage, now rebranded as NatureScot) in 2011. It states that NatureScot assesses licence applications against three licensing tests:
- Test 1: there must be a legal purpose
 - Test 2: there must be no satisfactory alternative
 - Test 3: the proposed action must not be detrimental to the maintenance of the species at 'favourable conservation status' in relation to European Protected Species, or conservation and/or welfare in relation to other birds, plants and animals.
13. The Scottish Government states that the legislation does not provide for an appeal procedure for licensing decisions. However, all decisions by NatureScot are subject to challenge through the public sector complaints handling system, which includes recourse to the Scottish Public Sector Ombudsman (SPSO).
14. In the refusal process, the submission notes that refusals and novel/contentious licensing cases are first discussed with the Licensing Manager, who will also inform the Unit Manager. Applicants who have had applications refused must be clearly informed of the reasons for refusal.
15. The submission concludes that NatureScot ensures its decision-making process complies with the Regulatory Reform (Scotland) Act 2014, Scottish Regulators Strategic Code of Practice and Scottish Government's guidance, 'Right First Time' through application of transparent, proportionate and consistent processes which are set out in relevant guidance for their staff.
16. With this taken into consideration, the Scottish Government does not consider that additional accountability measures are required over and above those already in place for NatureScot, as part of the established NDPB Accountability and Governance Framework.

Petitioner submission

17. The petitioner's submission points out that the Wildlife & Countryside Act 1981 states that 'the appropriate agency shall not grant a license for any purpose mentioned in subsection(1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution.'
18. The petitioner highlights the terminology used by the Scottish Government in its submission, which states that there must be 'no satisfactory alternative' to

granting a license. The petitioner believes this is incorrect and conflicts with case law.

19. The petitioner states that 'to determine what constitutes a 'satisfactory solution', the authority must take into account the 'objective' of the legislation and understand the case law that defines it'.
20. He states that there must be a clear objective to support a decision as otherwise it is unclear how they have applied the "principle of proportionality".
21. The petitioner points out that the 'principle of proportionality' originates from Article 5 of the EU Treaty, which sets out that 'regulation should be the minimum required to achieve the objective'.
22. The petitioner believes that it is currently 'impossible for a citizen to hold NatureScot to account', suggesting that 'if it was made mandatory that they have to explain their 'objective' for decisions in the context of the aims of the legislation, especially for refusals, it would go some way to explain how they have applied 'proportionality'".

Action

23. The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

PE1895: MANDATORY ACCOUNTABILITY FOR NATURE SCOTLAND'S DECISION MAKING PROCEDURES

Petitioner

Gary Wall

Date Lodged

23 August 2021

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to make it mandatory for Nature Scotland to explain its conservation objectives in decision making within the framework of the Scottish Regulators Strategic Code of Practice and Scottish Governments guidance, 'Right First Time'.

Previous action

Persisted on holding Nature Scotland to account, this resulted in them cutting off communications. Contacted 3 MSPs and the Environment Minister and they have failed to get answers. Asked the Chairman and vice Chairwoman to assist in getting answers, and that failed. I went to the SPSO who rejected my complaint and then after appeal and complaint related to the Ombusman's code of conduct they admitted they were wrong but were unable to change the decision, that would require judicial review.

Background information

I've had several license applications refused but from this experience I've spent hundreds of hours researching case law, government policy and international conventions so I have a deep understanding of the legal aspect of licensing under Section 16 of the Wildlife & Countryside Act, which isn't black or white. The main influence being the principle of proportionality which originates from Article 5 of the EU Treaty, this states regulation should be the minimum required to achieve the objective. It should be mandatory for Nature Scotland to explain its "conservation objective" when refusing license applications. Nature Scotland are independent of government in decision making but I don't

believe that should mean they are unaccountable to the people of Scotland, which is my experience. In challenging them I have felt as though my human rights of freedom of expression, right to a fair trial and freedom from discrimination have been removed. Accountability should be mandatory.



Briefing for the Citizen Participation and Public Petitions Committee on PE1895: Mandatory accountability for Nature Scotland's decision making procedures, lodged by Gary Wall

Background – NatureScot

NatureScot (previously known as Scottish Natural Heritage or SNH) is Scotland's lead advisory body on nature, wildlife management, and landscape management across Scotland. NatureScot was established as an executive non-departmental public body (NDPB) under the provisions of [the Natural Heritage \(Scotland\) Act 1991](#). NDPBs are not part of the Scottish Government. They carry out administrative, commercial, executive or regulatory functions on behalf of Government; and operate within a framework of governance set by Ministers. The Scottish Government provides annual funding to NatureScot in the form of Grant in Aid to deliver its functions.

NatureScot's purpose is set out in [Section 1 of the Natural Heritage \(Scotland\) Act 1991](#) (as amended), as follows:

- To secure the conservation and enhancement of nature and landscapes;
- To foster their understanding and facilitate their enjoyment;
- To promote their sustainable use and management; and
- To further the conservation, control and sustainable management of deer in Scotland, and keep under review all matters, including their welfare, relating to deer.

NatureScot's [Corporate Plan for 2018 – 2022](#) sets out outcomes and priorities for the organisation for that period as well as indicators for success.

The Scottish Regulators Strategic Code of Practice

PE1895 calls on the Scottish Parliament to urge the Scottish Government to make it mandatory for Nature Scotland (taken to mean NatureScot) “to explain its conservation objectives in decision making within the framework of the Scottish Regulators Strategic Code of Practice and Scottish Governments guidance, 'Right First Time'.”

[The Scottish Regulators Strategic Code of Practice](#) was made under section 5 of [the Regulatory Reform \(Scotland\) Act 2014](#) which contains provisions for Scottish Ministers to issue a Code of Practice in relation to the exercise of regulatory functions by a regulator. The Code requires regulatory functions to be exercised in accordance with the principles of better regulation (see paragraph 2 of the Code). Regulatory functions include advice, guidance, licensing, permissions, monitoring and enforcement. The Code promotes an approach whereby regulators seek to understand those they regulate, including taking into account economic and business factors appropriately.

This Code applies to the devolved regulatory functions of regulators listed in Schedule 1 of the 2014 Act. This includes NatureScot (Scottish Natural Heritage as set out in the Act). NatureScot refers to requirements to take other interests into account i.e. wider social and economic interests, including through the Code, as its “balancing duties”. There is [detailed information on how NatureScot interprets and applies its balancing duties](#) on its website. The Code is also referenced in [NatureScot’s Corporate Plan](#) which states:

“Our work is also driven by legislation and Scottish Government strategies, including Scotland’s Economic Strategy, the Scottish Regulators’ Strategic Code of Practice, the Climate Change Plan, the National Marine Plan, the Land Use Strategy, the Scottish Forestry Strategy, the National Planning Framework, the Mental Health Strategy and the National Physical Activity Strategy.”

Right First Time

[Right First Time, published by the Scottish Government in January 2021](#) (updated from a previous version from 2010), is described as “a user guide intended to help people responsible for making, or advising on, decisions of public authorities”. It is essentially a tool to support good practice in public administration, collating existing

statutory duties and setting out suggested steps and checks in relation to decision-making processes e.g. checking for compliance with human rights and equality legislation, checking environmental duties and considering financial implications.

Alexa Morrison
Senior Researcher
06 September 2021

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Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH99 1SP

Scottish Government submission dated 22 October 2021

PE1895/A - Mandatory accountability for Naturescot's decision making procedures

Background

Formed in 1992 as Scottish Natural Heritage (SNH) (which remains its legal identity), NatureScot is Scotland's statutory nature conservation body and advisor to the Scottish Government on all aspects of nature, wildlife management and landscape across Scotland. It seeks to inspire and influence others in managing our natural resources sustainably. It is a statutory consultee in relation to appropriate planning applications, all marine license applications and environmental statements providing advice on the effects of plans, policies and development proposals.

NatureScot works in partnership with local authorities, other government agencies, voluntary environmental bodies, community groups, farmers and land managers. NatureScot works closely with the [Joint Nature Conservation Committee](#) (JNCC) and the equivalent bodies for England, Wales, and Northern Ireland to ensure a consistent approach to nature conservation throughout the United Kingdom and towards fulfilling its international obligations.

NatureScot rebranded from Scottish Natural Heritage in August 2020, NatureScot play a key role in supporting delivery of Ministerial environmental priorities, including climate change, biodiversity, wildlife, species and land management.

NatureScot's statutory functions, are contained in the Natural Heritage (Scotland) Act 1991 and a range of other key corporate documentation including its Framework Document, corporate and business plans. Agreed conservation priorities lie at the heart of NatureScot's decision making processes and are taken via its Board, sub-committees structures and appropriate license application process. All licensing applications are subject to rigorous process and the granting of licences, is underpinned by legislation setting out the specific purposes for which licences can be granted.

All decisions by NatureScot are subject to challenge via the established public sector complaints handling system which includes recourse to the Scottish Public Sector Ombudsman (SPSO), where appropriate.

Further detail is provided in the following paragraphs.

Accountability and Governance

NatureScot is classified as a Non Departmental Public Body (NDPB). Like all NDPB's in Scotland, they operate at 'arm's length' from Government but within an established framework of accountability and governance to Scottish Ministers and through them to the Scottish Parliament.

Key elements of the NDPB accountability and governance framework include:

- The Public Finance and Accountability (Scotland) Act 2000, including appointment of statutory of Accountable Officer;
- The Scottish Public Finance Manual (SPFM), which includes detailed governance, accounting and reporting requirements;
- Individual body founding legislation, which sets out delivery of public statutory functions;
- The duty to lay audited annual reports and accounts before the Scottish Parliament
- Framework Documents
- Delivery of agreed corporate and operational plans;
- Monitoring and reporting arrangements agreed with the Scottish Government Sponsorship Team

Role of the NatureScot Board and Senior Management Team

As an 'arm's length' body the NatureScot Board plays a crucial role in the running of the organisation. The role of the board is to provide leadership, direction, support, guidance and challenge to ensure the Body delivers and is committed to delivering its functions effectively and efficiently and in accordance with the aims, policies and priorities of the Scottish Ministers and founding legislation. Specifically:

- taking forward the strategic aims and objectives for the body agreed by the Scottish Ministers
- promoting the efficient, economic and effective use of staff and other resources by the NDPB consistent with the principles of [Best Value](#), including, where appropriate, participation in shared services arrangements
- ensuring that effective arrangements are in place to provide assurance on risk management, governance and internal control.
- (in reaching decisions) taking into account relevant guidance issued by the Scottish Ministers

NatureScot operates by delegating decision-making and delivery of functions and responsibilities to the local level to ensure that they reflect local circumstances. Casework brought to the Board will, therefore, be kept to the minimum necessary to ensure proper accountability and the effective operation of NatureScot.

The Senior Management Team is the strategic and operational management group in NatureScot. It is at the centre of the whole organisation, operating between the Board and the staff. It is responsible for the operational management of NatureScot and for developing, in partnership with the Board, the policies and strategies of NatureScot. It is responsible for the resources of staff and finance are managed in an effective and efficient way to achieve the aims of NatureScot, as set out in the Corporate and Business Plans, through performance review and monitoring systems, by developing a flexible organisational structure within a system of delegated resource management responsibilities. Specifically:

- To provide strategic leadership
- To develop key policies
- To lead continuous improvement within the organisation and promote best value.
- To effectively manage business change
- To agree priorities in line with Scottish Governments' key targets and effectively manage resources to deliver the organisation's performance.
- Effective governance of spend against outcomes at an organisational level.
- Set out NatureScot decision-making procedure generally and specifically in the case of licensing (governed by Wildlife and Countryside Act and by Habitats Regulations and other relevant legislation). No appeal procedure for licensing decisions provided for in the legislation.

Licence Decisions

Scottish Ministers delegated licensing functions under the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats, &c.) Regulations 1994 to SNH in 2011. Licensing decisions are now a core operational element of NatureScot's work.

NatureScot assess licence applications against three licensing tests:

- Test 1, there must be a legal purpose
- Test 2, there must be no satisfactory alternative
- Test 3, the proposed action must not be detrimental to the maintenance of the species at 'favourable conservation status' in relation to European Protected Species, or conservation and/or welfare in relation to other birds, plants and animals.

In relation to the Wildlife and Countryside Act 1981, tests 1 and 2 are statutory for wild birds – with test 3 compliance (conservation and/or welfare) being a policy

decision to reflect the reality that ‘conservation’ issues can sometimes be more, or indeed less, important than ‘welfare’ issues’.

Licensing Officers assess and grant licences. Refusals and novel/contentious licensing cases are first discussed with the Licensing Manager, who will also inform the Unit Manager. Applicants who have had applications refused must be clearly informed of the reasons for refusal. Scottish Government are also informed of any novel or contentious licensing cases that we receive.

While there is no appeal procedure for licensing decisions provided for in the relevant legislation, all decisions by NatureScot are subject to their complaints handling process. In line with public sector complaints handling arrangements, any outstanding issues can be referred to the Scottish Public Sector Ombudsman (SPSO) for final adjudication if necessary. Details of the NatureScot complaints handling system are available at [NatureScot website](#)

Conclusion

NatureScot ensures its decision making complies with the Regulatory Reform (Scotland) Act 2014, Scottish Regulators Strategic Code of Practice and Scottish Government’s guidance, 'Right First Time' through application of transparent, proportionate and consistent processes which are set out in relevant guidance for their staff. This approach is summarised in the NatureScot guidance – Applying NatureScot’s Balancing Duties <https://www.nature.scot/doc/applying-naturescots-balancing-duties-guidance-notice> NatureScot worked closely with Scottish Government colleagues during the drafting of Scottish Regulators Strategic Code of Practice and it has been part of their way of working since it was introduced.

The overall purpose of the established accountability and governance framework within which all NDPBs in Scotland operate, including NatureScot is to ensure effectiveness, efficiency, openness and transparency in the discharge of public functions. Taken together as a package, there are substantial requirements placed on all NDPBs to account for their performance and delivery of functions, including any statutory decision making processes. In addition, established public sector complaints handling arrangements, including the role of the Scottish Public Sector Ombudsman (SPSO) ensure that there can be independent scrutiny where appropriate.

We do not consider that additional accountability measures are required over and above those already in place for NatureScot, as part of the established NDPB Accountability and Governance Framework.

Petitioner submission of 26 October 2021 PE1895/B - Mandatory accountability for NatureScot's decision making procedures

Section 16.(1A) of the Wildlife & Countryside Act 1981 states -
"The appropriate authority - (a) shall not grant a license for any purpose mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory SOLUTION;"

Scottish Governments statement to my petition states - "Test 2, there must be no satisfactory ALTERNATIVE"

This statement in "Test 2" is INCORRECT, and conflicts with case law. These are two statements taken from European Court of Justice judgements (C-78/08) that refer to the issue -

38 "..... the lack of any other satisfactory solution does not refer to the lack of any alternative solution, but to the lack of any acceptable and sufficiently appropriate solution in relation to the objective pursued,"

56." The Community legislature, by using the expression 'other satisfactory solution', did not intend to prevent use of the derogation laid down in Article 9(1)(c) of the Directive where any opportunity whatsoever exists "

To determine what constitutes a "satisfactory SOLUTION" the authority must take into account the "objective" of the legislation and understand the case law that defines it. Our legislation is the implementation of EU Directives, the objective of the EU Birds Directive is to maintain the "favourable conservation status" of the species and when this isn't threatened, caters for sustainable use. Authority must understand and confine their objective within this parameter and be able to convey that to the applicant. There has to be a clear objective to support a decision otherwise it's unclear how they have applied the "principle of proportionality". The foundation of the latter originates from Article 5 of the EU Treaty, in that, regulation should be the minimum required to achieve the objective. NatureScot have refused my license applications in favour of an alternative which isn't a "solution" to the purpose of the application without explaining their objective.

I've tried holding NatureScot to account by using all what's detailed in Scottish Governments statement, and failed. There is no appeal process, only complaints but NatureScot avoid addressing case law. I complained to the SPSO, it was rejected with no explanation so I complained to the Ombudsman and their response was they could see how Nature Scot had NOT explicitly answered my questions but they couldn't change their decision, it would require judicial review.

Three MSP's have been unwilling to challenge NatureScot's position on policy, the Board wouldn't address the problems I've encountered and the Chairman refused to meet me. I wrote to the Minister about the conflict between licensing decisions and government policy. They haven't addressed it but FoI shows their office obtained a "suggested response" from NatureScot to send to me. So, don't Scottish Government have an opinion when an authority, who have a statutory duty to implement their policies, don't comply?

In my experience NatureScot ignore their Statutory Code of Practice, they ignore "Right First Time", both editions, they ignore government policies such as the GB Invasive Non-Native Species Strategy and they also ignore international conventions that Scottish Government support such as the UN's Convention in Biodiversity, its related Aichi targets 13 & 18, and the Covenant on Social, Economic and Cultural Rights, they ignore all this, and more, in favour of an single "alternative" that isn't a "solution" ! The result of me trying to address these issues was two notifications of unacceptable behaviour for persistence which included two periods of cessation of communication, all for trying to get them to address policy and procedures that Scottish Government have highlighted in their statement. I feel my human rights are being abused.

It was made clear to me by NatureScot staff that they do not routinely take qualified legal advice on case law that may affect licensing decisions unless the issue is directly from a solicitor. So, biologists with little understanding of case law are interpreting the law with no qualified advice. I don't believe this is acceptable, if nothing else they are discriminating against citizens such as myself, who have taken the time and trouble to research case law, in favour of solicitors.

It's impossible for a citizen to hold NatureScot to account but if it was made mandatory that they have to explain their "objective" for decisions in the context of the aims of legislation, especially for refusals, it would go some way to explain how they have applied "proportionality" and narrow the field of conflict.

My objective is to utilise, sustainably, a native species which will reduce the use of non-native ones. NatureScots alternative is use non-native species obtained through commercial means but won't explain their objective, other than "to follow the law". I am not challenging a decision, my petition is an attempt to make NatureScot accountable for them.

It's also difficult to explain all these issues in detail in 800 words