

## **Response to the Ecocide (Prevention) Bill (Scotland), proposed by Monica Lennon MSP**

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### *Executive summary*

The thresholds in the proposed Bill should:

1. Not be restrictively narrow and should therefore be designed to capture the full range of pollution offences that threaten our environment and eco-system.
2. Capture offending by both corporations and individuals.
3. Not allow senior executives to pass criminal responsibility down the corporate chain of command to employees who have less control and authority over decision making.

The thresholds in the Stop Ecocide proposals are designed for the International Criminal Court, and will not achieve any of the priorities set out above.

In order to be successful any new offence of ecocide should incorporate a series of mechanisms that enable workers and communities to take an active role in preventing and responding to ecocidal behaviour, including:

- A new power of reporting for workers' representatives that makes provision for workers and their representatives to report ecocide and to request an investigation by the enforcing authorities.
- A new power of reporting for communities that makes provision for communities and community-based organisations to report ecocide and to request an investigation by the enforcing authorities.

- The new law could explicitly include the possibility for private prosecutions for ecocide offences.
- The Ecocide (Prevention) Bill (Scotland) should make provision for a ‘necessity defence’ for those protesting against ecocide acts committed by individuals or corporations.
- A new Scottish ecocide law should make it a criminal offence to sanction or dismiss employees who raise issues relating to a crime of ecocide.
- Details of investigations, prosecutions and their outcomes should be held on a public register administered by SEPA.
- As part of the sentence, the courts should require that all convictions must be published in company annual reports and accounts.

Tougher penalties introduced by a new law of ecocide must avoid the unintended consequence of punishing employees rather than those who author or have sufficient authority to prevent the offence. Thus, any new Scottish ecocide offence should be linked to a system of ‘equity fines’ to ensure that workers and communities are not doubly punished for ecocide.

The Scottish Environmental Protection Agency is the critical agency in this field and currently does not have the capacity to viably implement existing law and any future law that address ecocide threats. Systemic underfunding will need to be reversed and pre-2010 levels of funding restored, with an additional resource added to deal with the new burden of investigation and prosecution.

## *2. Critique of the thresholds and application of Stop Ecocide’s proposals*

We strongly warn against thresholds in the proposed Bill simply being copied across from the Stop Ecocide proposal. Those thresholds are designed for use in international law and are un-necessarily restrictive for domestic law. It is difficult to see how a case of ecocide envisaged in the consultation document might be prosecuted if thresholds are set as per the Stop Ecocide proposals.

For example, the definition of ‘wanton’ may create difficulties for prosecution in Scottish law. It includes a ‘proportionality test’, the key wording of which is “damage which would be clearly excessive in relation to the social and economic benefits anticipated.” When the courts are asked to adjudicate using such a test, they will assess whether or not the anticipated benefits could be secured using other means. There is little doubt that an action to prevent over-use of chemicals in agriculture or to prevent toxic pollution in rivers, where those may be causing ecocide, but may not exceed published legal limits, would be defended on the basis that such damage would not be excessive in relation to the “social and economic benefits anticipated.” Removing this wording would make the offence much clearer, would avoid doubt in the courts, and would remove a threshold that is significantly higher than that generally required in Scottish environmental law (for example in the Regulatory Reform (Scotland) Act) 2014.

This is one example. In general, there is no reason why those thresholds cannot be less restrictive in the Scottish domestic context than they would be in the ICC. The

proposals in Baroness Boycott’s Private Members Bill to make ecocide a criminal offence in England and Wales currently before the Westminster parliament set out more stringent and domestically appropriate thresholds that would enable prosecution for offences that are currently not captured by existing environmental laws (see the annex to this document).

A further reason to be cautious about adopting the Stop Ecocide proposals for environmental crime offences committed in Scotland is that they exclude any possibility of the prosecution of companies committing acts of mass destruction of the environment. It has been notoriously difficult in UK law to develop a *mens rea* test for corporations.<sup>1</sup> The current Stop Ecocide proposal is based on a mode of liability that is more clearly in line with the Rome Statute of the International Criminal Court, in which only natural persons (ie not corporate persons) can be indicted.

Strict liability is the dominant form of liability applied in Scottish environmental regulation and law (and indeed other forms of social regulation). This is partly because of the historical development of this concept as a means of holding legal entities responsible. Strict liability allows corporations to be held liable for environmental damage because it does not need a *mens rea* knowledge requirement to be shown.

A related issue is that the ‘knowledge test’ applied in such cases often acts as a barrier to successful prosecution. A senior executive cannot escape liability for such an offence simply by claiming that they lacked knowledge, or that responsibility for conducting the offence was devolved further down the line of command. Such offences require appropriate mechanisms for attributing liability that account for ‘wilful ignorance’ or ‘wilful blindness’.

The failure to identify a controlling mind has been an ongoing barrier to the prosecution of individuals. Any knowledge test for Ecocide would have to steer clear of any such test that renders the law ineffective, would require a knowledge test that is appropriate, that enables the prosecutions of companies and individuals, and does not allow senior executives to pass criminal responsibility down the corporate chain of command to employees who have less control and authority over decision making.

Again, we direct this consultation to the proposals set out in Baroness Boycott’s Ecocide Bill 2024 which set out a mechanism that enables the prosecution of both individuals and companies and establishes appropriate mechanisms for attributing liability.

### 3. *The problem of enforcement*

We have been here before. In 2004, after a concerted campaign involving trade unions, victims’ groups and campaigners, the Corporate Manslaughter and Corporate Homicide Act (2005) was introduced. Whilst there are two ongoing investigations, there have

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<sup>1</sup> Key authorities on this include criminal law professors Gary Slapper (*Blood in the Bank*, Routledge 1999) and Celia Wells (*Corporations and Criminal Responsibility*, Oxford University Press, 2001).

been no prosecutions for Corporate Homicide in Scotland in almost 20 years of the law being on the statute books.

In our view, the Regulatory Reform (Scotland) Act 2014 contains sufficient powers to precipitate prosecution for exactly the type of offence set out in the consultation document, although the maximum fine for offences under this Act (£40,000) is not appropriate for the most serious environmental offences. However, we also note that provisions in the 2002 Proceeds of Crime Act (POCA) have been used effectively to punish environmental offending and remove this upper limit for the courts (see footnote 9). The Act set out regulatory duties on sustainable economic growth and gave the courts additional powers to deal with environmental crime. It also gave the Scottish Environmental Protection Agency (SEPA) further powers to enforce environmental laws.

There are issues about the level of penalties that might be applied to corporations in this Act and we suggest a review of the SEPA/ COPFS environmental crime protocol and guidance may be needed. The Protocol was developed to ensure transparent arrangements between COPFS and SEPA so that cases were “dealt with in the most effective and consistent way”.<sup>2</sup>

Problems relevant to ecocide in Scotland also exist with regard to protection of biodiversity and ecosystems that impact directly and indirectly on sustainability and public health. For example, police enforcement of wildlife crime laws in Scotland linked to moorland habitat preservation and the protection of inhabitant species including endemic raptor species that help preserve nature and landscapes is limited and in the courts, generally ineffective. Failures of such measures have implications for and impacts on equalities, race, mental health and well-being, human rights, biodiversity loss, and environmental degradation.<sup>3</sup>

Failures to address ecocide threats also have economic implications with pollution, loss of biodiversity and lack of access to nature contributing to ill-health directly and indirectly. There is evidence to suggest pollution, climate change and sustainability costs are externalised by the polluters and those damaging nature and borne by the wider population. An Ecocide (Prevention) Bill would therefore save funds for NHS Scotland and other public services. In addition, the Bill is an opportunity to further facilitate Scottish Government policies on a just transition and the creation of green jobs central to climate change action, social and economic sustainability, and long-term ecological stability.

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<sup>2</sup> <https://www.copfs.gov.uk/media/auxpnuv4/scottish-environment-protection-agency-joint-working-protocol.pdf>

<sup>3</sup> [https://www.care.org/wp-content/uploads/2022/03/Gender-inequality-biodiversity-loss-and-environmental-degradation\\_final-for-publication-1.pdf](https://www.care.org/wp-content/uploads/2022/03/Gender-inequality-biodiversity-loss-and-environmental-degradation_final-for-publication-1.pdf); see also Cianconi P. Hirsch D. Chiappini S. Martinotti G. and Janiri L. (2022) Climate change, biodiversity loss and mental health: a global perspective (2022) *British Journal of Psychology International*, vol 19, no. 4:83-86; see also Mind at: <https://www.mind.org.uk/information-support/tips-for-everyday-living/nature-and-mental-health/how-nature-benefits-mental-health/#:~:text=Spending%20time%20in%20green%20space,improve%20your%20mood;>

The real problem with the use and application of existing law noted above is the lack of political will to enforce it, the related lack of enforcement capacity in regulatory agencies, and more generally a risk averse approach to regulatory enforcement. This is not a problem that is confined to Scotland, and neither is it a problem that is confined to environmental regulation. It is the result of the ongoing managed decline of Britain's regulatory capacity.<sup>4</sup> We address these issues, as they apply to SEPA in the following section.

#### 4. *SEPA, political will and regulatory enforcement*

Overall, enforcement action by SEPA has been in steady decline since 2010. Between 2010 and 2022 there was a 70% decline in overall enforcement action by SEPA.<sup>5</sup> In 2010 there were 41 cases referred to the Procurator Fiscal for prosecution by SEPA; in 2021 there were just two case referred to the Procurator Fiscal for prosecution. These declines should be seen the context of a declining total annual budget for SEPA. SEPA receives approximately half its annual budget from the Scottish government, while the remainder is from charges and pollution licences it levies on businesses. The total annual budget for SEPA including government funding and licence charges for the financial year 2015/16 was £83.6 million, in 2021/2022 this budget was £95.6 million.<sup>6</sup> While this appears to be a budgetary increase of £12 million, allowing for inflation, this equates to a real terms budget cut of 16% in 6 years.

The enforcement costs incurred through a stronger, better resourced and staffed SEPA using the Regulatory Reform (Scotland) Act 2014 and stronger wildlife crime enforcement to address ecocide in Scotland will be offset. This is the case because in the middle and long term enforcement costs incurred would be far outweighed by the economic gains from environmental measures that better protected Scotland's climate and public health. The existential threats of ecocide and its contribution to climate breakdown will necessitate greater action in any case from now.

SEPA is the critical agency in this field and needs the resources, staff, policies and leadership to viably implement existing law and any future law that adequately address ecocide threats. Currently SEPA policies, in difficult financial times, appear to weight and be influenced by input of advocates from polluting industries at board level.<sup>7</sup> Its policies have also prioritised a 'better regulation' approach. This is because SEPA's assessment of regulation currently stresses "changing behaviour in a way that generates positive outcomes for the environment, communities and the economy". Indeed, in the past 4 years, the reduced enforcement work done by SEPA is relatively low-impact. It has only issued two summary fines larger than £600 in this period.

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<sup>4</sup> Tombs, S. (2017) *Social Protection after the Crisis: Regulation without Enforcement*, Bristol: Bristol University Press; Tombs, S. and Whyte, D. (2010) *Regulatory Surrender: death, injury and the non-enforcement of law*, London: Institute of Employment Rights.

<sup>5</sup> *Freedom of Information request to SEPA by Violation Tracker*, response dated 30<sup>th</sup> November 2023.

<sup>6</sup> As above

<sup>7</sup> Paul Dobson (2024) Hard to fathom: second ex-Shell employee added to SEPA board, *The Ferret*, January 30<sup>th</sup>, Available online at: <https://theferret.scot/second-ex-shell-employee-added-to-sepas-board/>

For SEPA to address ecocide, climate change and general pollution issues effectively, a stronger monitoring, inspection and enforcement policy will be required and linked to appropriate information and advice. This will mean more technical, field and policy staff in place and improved leadership. It will also mean a greater level of monitoring and recording of workplace hazards so that health impacts of working in particular sectors and environments are understood properly.

In order to avoid the fate of the Corporate Manslaughter and Corporate Homicide Act - which has in 16 years yielded not one single prosecution in Scotland – a new Scottish ecocide law would need to be backed by political will and resources. Realistically, SEPA would require a new investigation and enforcement unit dedicated to dealing with cases of ecocide. The systemic underfunding indicated above would need to be reversed and pre-2010 levels of funding restored, with an additional resource added to deal with the new burden of investigation and prosecution (amounting to at least a 30-35% increase in all sources of funding). This is not something that a new law can automatically fix, but it is central to the realisation of the vision set out in the consultation.

#### 5. *Empowering stakeholders*

The health and well-being of our communities must be prioritised over the promotion of business interests and the economic needs of the few. This means promoting the long term needs of human and animal health and the protection of the natural environment as a matter of the utmost priority.

The experience of the Corporate Manslaughter and Corporate Homicide Act provides us with an example of a similar law that was introduced with the aim of precipitating a major cultural shift. The Act came about after many years of work by trade unions and victims' organisations in the wake of the Piper Alpha and Zeebrugge disasters, and a series of train disasters in the 1990s. In Scotland, Scottish Hazards and the Scottish Trades Union Congress (STUC) were instrumental in pressuring the (then) Scottish Executive to propose a new Bill on Corporate Homicide in Scotland which was eventually incorporated into the UK law.

As we note above there is yet to be a single prosecution under this Act, yet deaths at work in Scotland continue to plague workers. In 2007-2008, the year the new Corporate Homicide law was introduced in Scotland, the Health and Safety Executive (HSE) reported that 24 deaths were caused by working. Between April 2022 and March 2023 there were 26 deaths reported to HSE.<sup>8</sup> Moreover, the rate of worker deaths in Scotland remains significantly higher than in England and Wales.<sup>9</sup>

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<sup>8</sup> We wish to stress that HSE's RIDDOR reporting requirements exclude large numbers of deaths caused by working (notably long-term illnesses caused by chemical and substance exposures, deaths in offshore waters and deaths caused by driving at work) and ultimately reflect only a fraction of those who die as a result of working. However, we cite those figures as indicators of the scale of deaths that the HSE deals with; this figure is significantly worsening and evidence gathered by Scottish Hazards indicates that the comprehensive picture of work-caused deaths is worsening.

<sup>9</sup> HSE (2023) *Work-related fatal injuries in Great Britain*, London: HSE.

Whilst we have argued above that both political leadership and the resourcing of regulatory enforcement are crucial, this experience warns us against simply granting authority to government bodies, without at the same time building public support and the capacity for involvement of communities and those working in the industries most affected by ecocidal practices.

Any new viable ecocide law for Scotland would have to empower communities and workers. We outline four ways in which this empowerment might be developed in the proposal for a new ecocide law.

### 5.1 Avoiding sanctions that punish workers and communities

When a company is fined, the effect is nothing like imposing a fine on an individual. This is because a sentence handed down by a judge is only the first stage in deciding who is punished. The final decision lies with the company itself. Decisions can then be made to cut staff, to cut wages, or to delay maintenance programmes with perverse consequences. Fines have been found to lead to a decline in service quality, pollution control and other associated public goods. Furthermore, fines have a negligible impact on shareholder value.

The Transco disaster in Larkhall in 1999 was one of the main drivers of a new offence of Corporate Homicide; this case illustrates the problem noted above. When Transco, a subsidiary of British Gas, was found to have killed a family of 4 in Larkhall in Scotland in 1999, in a gas explosion, it received a £14 million fine, at the time, the highest fine ever for a health and safety offence in Britain. British Gas was then found to have paid for the fine by cutting back on its maintenance programme. Yet the court had found that cuts to the maintenance budget by British Gas has been a major contributing factor – perhaps the most important factor - in causing the explosion.

No prosecution for an environmental offence in Scotland has been penalised with anything like this level of fine.<sup>10</sup> Significant fines for a new offence of ecocide would create the same problem. As senior managers are in left charge of deciding who pays the costs of a fine, they will ensure shareholders are protected. This is not a criticism of them. This is their job. Indeed, they are under a legal obligation to protect shareholders. The ‘fiduciary duty’ to act in the interests of shareholders is a sacrosanct first duty of CEOs in almost all legal systems.

Sentencing Judges also have to take into account that any sentence should not impact on the future viability of the negligent company, since reckless and systemically irresponsible companies should not have an unrestricted licence to operate. This is a crucial principle that the courts must uphold, but it of course carries risks for jobs and may have a long term impact on economies.

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<sup>10</sup> The record fine in Scotland for a pollution offence was levied against a recycling company based in Alloa that was forced to pay almost given a £345,558.43 confiscation order under the 2002 Proceeds of Crime Act (POCA), reflecting the costs it avoided through its illegal activity.

There is a way to deal with this issue. Campaign organisations like We Own It and Ethical Consumer have recently argued for a system of ‘equity fines’ in order to avoid communities and workers absorbing corporate punishment.<sup>11</sup> Equity fines allow the courts to bypass the CEO and go straight to those that benefit the most from company wrongdoing. They target shareholders without allowing cuts elsewhere in the organisation. When it imposes an equity fine, the court orders an offending company to issue a set number of new shares in the firm. This proportion of the shares can be held in a public ‘compensation fund’ and controlled by a local authority, or a group of consumers, or could be controlled by workers in the company or indeed their trade union. The process effectively dilutes the value of shares held by the owners of the company without penalising communities, consumers or employees. Funds for investment would not be depleted but merely reallocated to the compensation fund from existing shareholdings.

**Any new Scottish ecocide offence should be linked to a system of ‘equity fines’ to ensure that workers and communities are not doubly punished for ecocide.**

#### 5.2 Empowering workers – the right to initiate investigation/roving powers/initiating criminal complaints

**In order to be successful any new offence of ecocide should incorporate mechanism that enable workers and communities to take an active role in preventing and responding to ecocidal behaviour. This could be encouraged by linking a series of rights for individuals and organisations to participate in the reporting and the enforcement of a new law. We propose the following to achieve this:**

- **A new power of reporting for workers’ representatives that makes provision for workers and their representatives to report ecocide and to request an investigation by the enforcing authorities should be introduced as a power that is exclusively linked to the reporting and of this offence.**<sup>12</sup> This can be achieved through the system of health and safety representatives under existing law and can be supplemented by voluntary guidance issued by the STUC to its member organisations and to workplace environmental reps. A good example of such guidance for health and safety reps has been issued by the TUC and its promotion of voluntary Union Improvement Notices may serve as a model, if backed by statutory powers set out in the proposed Bill.
- **A new power of reporting for communities that makes provision for communities and community-based organisations to report ecocide and to request an investigation by the enforcing authorities.**
- Private prosecution. **The new law could explicitly include the possibility for private prosecutions for ecocide offences.**

#### 5.3 Empowering whistleblowers at work

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<sup>11</sup> <https://weownit.org.uk/act-now/take-shares-not-fines>

<sup>12</sup> Were workplace health and safety legislation devolved to Scotland, we would strongly support the extension of those power granted to safety reps under the Safety Representatives and Safety Committee Regulations 1977, but we also accept that such a proposal would be deemed outside the legislative competence of the Scottish Parliament.



Members of the public and employees must know that they are protected by law if they engage in any of the activities mapped out in 4.2 above, or if they are engaged in any form of public whistleblowing. Whilst there is existing law covering Scotland that protects whistleblowers. It is currently unlawful for an employer to dismiss an employee or victimise a worker for making a Protected Disclosure (raising whistleblowing concerns). However, employment law only provides for action to be taken by employees against their employer after the fact, and provides for a limited monetary sanction against the employer.

**Whistleblowers in the workplace would be greatly empowered if a new Scottish ecocide law made it a criminal offence to sanction or dismiss employees who raise issues relating to a crime of ecocide.**

#### 5.4 Challenging ecocide as a ‘necessity defence’

We are concerned about recent reforms introduced in Westminster that have been aimed at criminalising environmental protestors in England and Wales. Those policies have been described by the UN Special Rapporteur on Environmental Defenders as ‘terrifying’. Those taking peaceful action to expose ecocide are increasingly jailed for extended periods. There is a close relationship between those laws, designed to restrict the right to lawful protest and recent anti-trade union laws – namely the Strikes (Minimum Service Levels) Act – that further restrict workers taking lawful industrial action. A new law of ecocide in Scotland provides an opportunity to resist a concomitant civil rights clampdown, and to set out a different approach to protecting Scottish ecosystems and those who seek to take action to defend them peacefully. **We suggest the Ecocide (Prevention) Bill (Scotland) makes provision for a ‘necessity defence’ for those protesting against ecocide acts committed by individuals or corporations.** Thus, where there is reasonable evidence of a crime of ecocide taking place, protestors could cite this as a defence in any legal proceedings taken against them. This would put a defence that is increasingly prevalent in court cases dealing with environmental protests in Scotland on a statutory footing.

#### 5.5 Public registers

We suggest that all investigations and their outcomes are a matter of public record. This would enable offenders to be ‘named and shamed’ and would promote the transparency of the process. We propose doing this in two ways:

**5.5.1 The online publication of details on a public register administered by SEPA.**

**5.5.2 As part of the sentence, the courts should require that all convictions must be published in company annual reports and accounts.**

## 6. Conclusion

We welcome the proposals for an Ecocide (Prevention) Bill (Scotland) as an opportunity to incorporate measures that empower workers and communities, rather than solely relying upon ‘top-down’ political action. Exiting this crisis requires mobilising ordinary people to take the lead in combatting ecocide.

We have a real opportunity to support the changes necessary to deal with the urgent threats to our eco-system. The Ecocide (Prevention) Bill (Scotland) must create a credible threat to offenders, rebuild our capacity to take action against those that pollute Scotland, and take the lead in international initiatives.

This opportunity should not be wasted on reforms that present no threat to the vested interests that stand in the way of this necessary transition.

The Scottish Parliament and Government can provide leadership on climate action by introducing measures that give meaningful powers to prosecutors and mobilises the social power of workers and communities.

Submitted by:

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<https://ccccjustice.org/>

We Own It <https://weownit.org.uk/>

Scottish Hazards Campaign <https://hazards.scot/>

UK Hazards Campaign <https://www.hazardscampaign.org.uk/>

Institute of Employment Rights <https://www.ier.org.uk/>

Violation Tracker UK <https://violationtrackeruk.goodjobsfirst.org/>

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