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The UK Environment Bill

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The Environment Bill is an extensive UK Government Bill containing provisions on post EU-Exit environmental governance and environmental principles, and a range of environmental targets and provisions across policy areas including waste, water, air quality and chemicals. This briefing provides a summary of the Bill, focusing on the clauses which apply in Scotland and their implications.



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Executive Summary

The [Environment Bill](#) is an extensive UK Government Bill containing provisions on post EU-Exit environmental governance and principles, a range of environmental targets and provisions across policy areas including waste, water, air quality and chemicals.

The Bill was published on 30 January 2020 and is the reintroduction of a UK Government Bill from the previous Parliamentary session.

Territorial extent of the Bill

Most of the Bill applies in England only. However, there are also significant provisions in the Bill which apply to Scotland, Wales and Northern Ireland. A number of the UK-wide provisions create delegated powers where areas of devolved environmental policy are expected to be regulated at a UK-wide level with the consent of Scottish Ministers. There are also a number of areas in the Bill that extend to Scotland by virtue of their being **reserved areas**.

Significance of the Bill in the post EU exit landscape

Many environmental laws in the UK were adopted to implement EU law. From 1 January 2021, EU law will no longer apply in the UK. A number of provisions of the UK Environment Bill are a direct result of EU exit because regulation in those areas was centralised at EU level, or because they set out to replace governance functions fulfilled by EU institutions.

Other parts of the Bill relate to developments in EU environmental law where, although the UK Government is not required to do so after the transition period, it has committed to take those forward e.g. to develop the circular economy. Other parts of the UK Environment Bill introduce environmental laws that do not directly relate to EU exit.

What the Bill does

Part One of the Bill contains measures to address **environmental governance gaps** following EU exit. Legislative consent from the Scottish Parliament is not being sought in respect of any clauses in Part 1. The key clauses in this Part of the Bill that apply in Scotland relate to the establishment of a new Office of Environmental Protection (OEP) for the UK - a domestic independent environmental watchdog with scrutiny, advice and enforcement functions.

The remit of the OEP in Scotland is expected to be fairly limited, triggered when the UK Government or public bodies are exercising reserved functions in Scotland - in general the environment is a devolved area.

Part 1 of the Bill also establishes the role of environmental principles, but these clauses do not apply to Scotland. The Scottish Government [conducted its own consultation on environmental governance and principles in 2019](#), and is expected to include provisions on both in the forthcoming Continuity Bill.

Part 2 of the Bill contains provisions on environmental improvement plans and environmental principles in Northern Ireland.

Part 3 of the Bill includes provisions on waste and resource efficiency. Waste is generally a devolved area, but some areas of waste regulation have been pursued at UK-level, primarily due to UK internal market reasons. A number of the waste clauses in the Bill also take forward elements of the EU Circular Economy Package (CEP) - which includes a revised [waste legislative framework](#) which entered into force in 2018. In 2019, the UK Government [expressed intentions to bring these new EU requirements into UK law](#).

Part 3 of the Bill:

- Introduces delegated powers for the relevant authorities to make Regulations for revised and extended **producer responsibility schemes**. These are **shared powers**,
 meaning that the regulations can be made for Scotland either by the Scottish Ministers acting alone, or by the UK Ministers if the Scottish Ministers consent. This power could be used to enable UK-wide producer responsibility schemes to be taken forward either via parallel regulations by each of the UK and devolved Governments, or by UK Regulations with the consent of Scottish Ministers and the other devolved Governments.
- Introduces delegated powers for relevant authorities to make Regulations on **the resource efficiency** of products. Again these are **shared powers** - Scottish Ministers could make Regulations for Scotland, or Regulations could be made by the UK Secretary of State which apply in Scotland, if Scottish Ministers consent.
- Introduces delegated powers for the relevant authorities to make Regulations to introduce **electronic waste tracking** i.e. the digital tracking of waste. The power is conferred on Scottish Ministers for Scotland; there is no power for UK-wide Regulations to be made by the UK Minister with consent.

A Legislative Consent Motion (LCM) is being sought in respect of the above provisions in Part 3. Part 3 also introduces powers for regulations to be made by the UK Secretary of State to regulate waste imports or exports - which is a reserved area.

Part 4 deals with air quality. Air quality is generally a devolved issue and most of this part of the Bill applies to England only. It includes a requirement for the UK national air quality strategy to be reviewed within one year of the new provision coming into force, and then at least every 5 years following the initial review. This applies in Scotland although the Scottish Government also produces its own air quality strategy. An LCM is being sought in respect of these provisions. Part 4 also includes a UK-wide provision to require the recall of motor vehicles on environmental grounds - a reserved area.

Part 5 of the Bill covers water quality; water resources; drainage; and the regulation of water and sewerage companies. Water quality is a devolved issue and most of this part of the Bill applies to England only, or England and Wales. A small number of provisions apply to Scotland because they relate to cross-border management of the Solway Tweed River Basin District which straddles Scotland and England. An LCM is being sought in respect of these provisions.

Part 6 of the Bill on nature and biodiversity, and **part 7** on conservation covenants, do not apply in Scotland.

Part 8 of the Bill (miscellaneous and general provisions) includes provisions on the **regulation of chemicals post EU exit**. Schedule 19 gives the UK Secretary of State the

power to amend the REACH Regulation and gives both the UK Secretary of State and Scottish Ministers the power to amend [the REACH Enforcement Regulations 2008](#). The REACH Regulation refers to the EU Regulation on chemicals: the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation - which will become retained EU law at the end of the transition period. "Retained EU law" means EU law which will be retained in UK law for the purposes of legal continuity. The retained EU law version of the REACH Regulation will apply in the UK as amended by the [REACH etc. \(Amendment etc.\) \(EU Exit\) Regulations 2019](#).

Chemicals regulation is currently highly centralised at EU level. In preparation for EU exit, Regulations were introduced using powers in the Withdrawal Act 2018 to create a new system of chemicals regulation in the UK, 'UK REACH'.

The Secretary of State's power to make regulations under Schedule 19 is subject to the requirement to obtain the consent of devolved administrations (Scottish Ministers for Scotland) where the changes being made relate to a devolved matter. This requirement is imposed by applying the consent requirement which is contained in new Article 4A of the REACH Regulation.

Schedule 19 also requires the Secretary of State to consider any request by Scottish Ministers for the Secretary of State to make regulations under this Schedule. The Bill provides for certain provisions of the REACH Regulation to be 'protected' from amendment, including provisions categorised as 'fundamental principles' of REACH. An LCM is being sought in respect of these provisions.

Legislative Consent Memorandum

The Scottish Government [published a Legislative Consent Memorandum](#) on 27 May 2020 stating its intention to lodge a Legislative Consent Motion in relation to the Bill.

Key documents and briefing structure

The Environment Bill ('the Bill') is structured in 8 Parts and 19 Schedules. **Key documents** and links are:

- The [Environment Bill \(as introduced\)](#)
- The [Environment Bill Explanatory Notes](#)
- The [Environment Bill Memorandum from the Department for the Environment, Food and Rural Affairs to the Delegated Powers and Regulatory Reform Committee](#) (which explains provisions that confer powers to make delegated legislation)
- The [House of Commons Library Analysis of the Environment Bill](#)
- The [policy statement made in support of the Bill](#) in the House of Commons.

[Listings of proposed amendments can be found](#) on the UK Parliament website.

The [Legislative Consent Memorandum \(lodged 27 May 2020\)](#) can be found [here](#).

Briefing structure

The briefing is structured to provide information and background on the clauses of the Bill that apply in Scotland and to discuss their implications. A number of the areas in this Bill **which do not apply in Scotland** may be of interest to the Scottish Parliament in terms of comparative approaches. For example, the Bill:

- Transfers EU **environmental principles** into UK law for England. The Scottish Government is expected to introduce provisions on environmental principles (and on environmental governance) in the forthcoming Continuity Bill - it will be necessary to consider how provisions in the Environment Bill and forthcoming Continuity Bill may interact;
- Sets out a framework of overarching **environmental targets** for England in priority areas (air quality, water, biodiversity, and resource efficiency and waste reduction) - [there have been calls in Scotland from environmental NGOs](#) for the Scottish Government to put environmental ambitions in its recently published Environment Strategy on a statutory footing in a 'Scottish Environment Act';
- Includes delegated powers to introduce regulations for a **Deposit Return Scheme** in England. Given [Regulations for a DRS in Scotland](#) were [approved by the Scottish Parliament in April](#), under which a scheme will go live in July 2022, there is likely to be interest in how schemes in different parts of the UK may interact in future.
- Provisions on nature include a requirement for new developments to deliver **biodiversity net gain** and provisions for local nature recovery strategies. The Bill also introduces provisions for conservation covenants, long-term agreements with land-owners to manage land for conservation purposes. Such obligations can exist in Scots law as 'conservation burdens' but have been little used. In light of the nature crisis in Scotland and globally ¹, future consideration of these approaches could be of interest.

Background to the Bill

The [UK Environment Bill](#) was published on 30 January 2020 and is the reintroduction of a UK Government Bill from the previous Parliamentary session. The [previous UK Environment Bill 2019](#), published on 15 October 2019, fell at dissolution for the General Election 2019.

The Bill has been committed to a Public Bill Committee which [held its first meeting on Tuesday 10 March 2020](#). Scrutiny of the Bill was paused in light of the Covid-19 pandemic. The Committee is [currently scheduled to report by Thursday 25 June 2020](#).

The Bill covers the introduction of new post-EU exit environmental governance arrangements, new environmental targets and a range of new powers and measures across areas of environmental law including waste, water, air quality, chemicals and biodiversity.

The [UK Government's policy statement accompanying the Bill](#) states:

“ The Environment Bill will help deliver the government’s manifesto commitment to delivering the most ambitious environmental programme of any country on earth.”

The Bill is closely linked to the [UK Government's 25 Year Environment Plan published in 2018](#), which set the policy direction for many of the provisions in the Bill, and the Bill puts a number of targets in the plan on a legislative footing. Although the 25 Year Plan does not apply to Scotland, it does set out UK Government policy on areas within this Bill that are proposed to be taken forward on a UK-wide basis.

Differences between this Bill and the (pre-UK general election) 2019 Environment Bill

The Bill is substantially the same as its predecessor apart from two substantive additions:

- a requirement on UK Ministers to make a statement to Parliament setting out the effect of new primary environmental legislation on levels of environmental protection (Clause 19 - which applies in Scotland); and
- a requirement on the Secretary of State to conduct a two-yearly review of significant developments in international legislation on the environment (Clause 20 - which does not apply in Scotland).

Pre-legislative scrutiny of environmental governance and principles clauses

Some parts of the Bill (covering environmental governance and principles) were subject to pre-legislative scrutiny in the UK Parliament in 2018. The [Draft Environment \(Principles and Governance\) Bill 2018](#) was published on 19 December 2018, fulfilling requirements for a draft Bill in section 16 of the [European Union \(Withdrawal\) Act 2018](#). Outcomes of that scrutiny are discussed later in the briefing in relation to Part 1 of the Bill.

Legal background and context

This section of the briefing provides background information on the impact of the UK leaving the EU on law making in devolved areas. It also examines the powers that Ministers have to make laws in devolved areas.

What does the UK leaving the EU mean for law making?

Many of the laws in the UK come from having been part of the EU. These laws cover issues from workers' rights to the labelling of food.

The UK left the EU on 31 January 2020. However, EU law will continue to apply during the transition period until 31 December 2020.

For the purposes of legal continuity, the UK Government wishes to preserve, as far as possible, the legal position which exists immediately before the end of the transition period. This will be achieved by taking a "snapshot" of all of the EU law that applies in the UK at that point and bringing it within the UK's domestic legal framework as a new category of law, known as "retained EU law".

The creation of this new category of UK law was one of the main purposes of the [European Union \(Withdrawal\) Act 2018](#). The Act aims to ensure that the UK has the laws it needs after the end of the transition period. This could include, for example, the law on the nutrition and health claims made on food, or on ensuring environmental protection in marine areas.

The UK will be able to amend the policy underlying retained EU law after the end of the transition period (i.e. with effect from 1 January 2021) by making new domestic laws (laws which apply to all of the UK or to one nation of it).

For more on how domestic laws will be made see '[Making new laws in devolved areas after EU exit](#)'.

Making new laws in devolved areas after EU exit

Some areas of law have always been determined at a UK level. For areas of law which are derived from the EU, the UK must continue to comply with that EU law until the end of the transition period on 31 December 2020.

From 1 January 2021 the UK will no longer require to conform to EU law. Responsibility for policy in areas which were previously dealt with at EU level will lie with the UK Government and the devolved governments.

Scottish Ministers will continue to have powers in devolved areas and the Scottish Parliament will continue to legislate for Scotland in respect of devolved matters. The UK Parliament has the power to pass law in all policy areas for the whole of the UK and it will continue to have that power.

The UK Parliament will not normally pass primary legislation (an Act of Parliament) in devolved areas without seeking the consent of the devolved legislatures. This is through [the process of legislative consent](#).

Prior to 2018, UK Ministers generally only had powers to make regulations (secondary legislation) in devolved areas for the purpose of giving effect to EU law. That law, and the policy behind it, had been decided through the EU legislative process.

[The European Union \(Withdrawal\) Act 2018](#) gives UK Ministers power to make regulations in devolved areas for the purposes of amending laws so that they work effectively after the UK leaves the EU. The aim of these kinds of regulations is to achieve legal continuity after the end of the transition period.

Some UK legislation, like the [European Union \(Withdrawal Agreement\) Act 2020](#) goes further and gives UK Ministers the power to make regulations (secondary legislation) which is capable of changing policy in devolved areas.

UK Ministers will not normally make such regulations in devolved areas without the consent of the Scottish Ministers. In some cases, that agreement is a legal requirement, but not in all. The Scottish Parliament cannot scrutinise secondary legislation laid at the UK Parliament. However it has a clear interest in such legislation where it relates to devolved matters.

The Scottish Parliament can scrutinise Scottish Ministers' decisions to consent to regulations which are made by UK Ministers in devolved areas. A process for this is being agreed between the Scottish Government and the Scottish Parliament. A [protocol is already in place for statutory instruments](#) made to fix deficiencies (gaps, errors and unintended consequences) as a result of powers given to UK and Scottish Ministers under the European Union (Withdrawal) Act 2018.

Do Ministers have new powers to make law in devolved areas as a result of EU exit?

[The European Union \(Withdrawal Act\) 2018](#) gives Scottish Ministers powers to amend the law in devolved areas by regulations (secondary legislation) so that Scottish laws work effectively after the UK leaves the EU and the transition period is complete. UK Ministers have powers under the [European Union \(Withdrawal Act\) 2018](#) to amend the laws in the UK, including Scottish laws, so that they work effectively after the UK leaves the EU. These powers have been conferred concurrently, meaning that either UK Ministers or the Scottish Ministers can make the regulations.

In some cases where the UK Government and the Scottish Government wish to pursue the same policy objective, the Scottish Government can ask the UK Government to lay statutory instruments that include proposals relating to devolved areas of responsibility. The UK Government can also make regulations in devolved areas without Scottish Ministers asking them to. UK Ministers will not normally make such regulations in devolved areas without the consent of the Scottish Ministers. That agreement is a legal requirement in some cases, but not in all.

The changes made by these kind of regulations are often technical and are there, in many cases, to achieve legal continuity. In some cases, the changes are minor – removing

references to EU institutions, for example. In other cases they are more significant - such as changes in regulatory requirements. The powers to make these kind of regulations are mainly time limited.

The [European Union \(Withdrawal Agreement\) Act 2020](#) does, however, give UK and Scottish Ministers a suite of new powers in devolved areas that go beyond correcting deficiencies to achieve legal continuity. These powers have been conferred concurrently, meaning that either UK Ministers or Scottish Ministers can make the regulations. The suite of concurrent powers includes:

- powers to implement long term obligations for the recognition of citizens' rights under the Withdrawal Agreement
- powers to deal with separation issues (arising from the UK leaving the EU) such as the regulation of goods placed on the market
- powers to implement the Ireland/Northern Ireland protocol.

There are other powers created or amended in the regulations made under the [European Union \(Withdrawal\) Act 2018](#) and also powers in other Brexit related legislation, such as the [Direct Payments to Farmers \(Legislative Continuity\) Act 2020](#). Some of these powers may be used to make regulations which change policy. The powers are generally not time limited.

Significance of the Bill in the post EU exit landscape

Many environmental laws in the UK were adopted to implement or comply with EU law. The UK left the EU on 31 January 2020, but EU law will continue to apply during the transition period until 31 December 2020.

From 1 January 2021, the UK has no obligation to comply with EU law. Responsibility for policy in areas which were previously covered by EU law will lie with the UK Government and the devolved governments.

A number of provisions of the **UK Environment Bill** are a direct result of EU exit because:

- Regulation in those areas was centralised at EU level e.g. provisions on chemicals regulation, so new powers or systems now require to be established for the UK and
- The Bill sets out to replace environmental governance functions e.g. monitoring and enforcement of environmental law previously fulfilled by EU institutions.

If new law was not made in this area then the legal position from 1 January 2021 would be as provided for under retained EU law.

Other parts of the Bill seek to take forward developments in EU environmental law and policy where, although the UK Government is not required to do so after the transition period, there remain Government commitments to take those forward. For example, the Bill implements, or enables future implementation, via delegated powers, of parts of the EU's Circular Economy Programme.

Other parts of the Bill introduce environmental laws that do not directly relate to EU exit - for example provisions on biodiversity net gain in planning, which do not apply in Scotland.

Scottish and UK Government policy on post-EU exit environmental standards

The Bill relates to how environmental governance (see box below) and aspects of environmental law will function post EU exit, and delegated powers - powers to use 'secondary legislation' to make law- are introduced that could be used to take forward some aspects of regulation at a UK-wide level. Therefore, it is important context to consider the Scottish and UK Government's positions on:

- Environmental standards and levels of environmental protection post EU exit generally;
- Maintaining specific existing EU environmental standards post EU exit i.e. 'non regression'; and
- Future regulatory alignment with EU environmental law i.e. 'keeping pace'.

Background - what is 'environmental governance'?

Environmental governance refers to the rules, practices, policies and institutions that shape how humans interact with the environment ².

Environmental governance in the UK presently includes a wide range of EU arrangements, including the making of legislation, and oversight of its implementation and enforcement by Member States.

Enforcement of EU law happens mainly through the European Commission, which can bring Member States before the Court of Justice of the EU ("CJEU"). If found to be in breach, the Member State can be required to pay fines. In addition to the enforcement powers of the Commission, members of the public and NGOs can initiate legal action before Member State courts to request compliance with EU law, and [can make complaints directly](#) to the Commission where they consider a Member State is breaking EU law.

Both the UK and Scottish Governments have recognised that if unmitigated, the loss of EU governance arrangements would result in environmental governance gaps, and therefore EU exit requires governance arrangements somehow to be replaced.

More detailed information can be found in the SPICe briefing, [Environmental Governance in Scotland after EU Exit](#).

Scottish Government policy on environmental standards post EU-exit

The Scottish Government's '[Environment Strategy for Scotland: vision and outcomes](#)' ³ (published in February 2020) reiterates the **Scottish Government's commitment to maintain or exceed existing environmental standards** in light of EU exit:

“ We are determined to retain the benefits we have enjoyed through membership of the EU in our approach to environmental protection. We will seek to maintain or exceed EU environmental standards. ”

On the issue of 'keeping pace', the Scottish Government announced plans in its [2019-2020 Programme for Government](#) to introduce a Continuity Bill in 2020, including provisions on keeping pace with EU law:

“ Remaining aligned with EU law will be an important signal to our European partners of our ongoing commitment to co-operation in the future. It will demonstrate that we will not accept any regression of protections and it will smooth the path for Scotland to re-join the EU.”

It is not clear at this stage if the proposed Continuity Bill will include any legislative *requirement* for non-regression or keeping pace - as opposed to powers that seek to *enable* keeping pace.

UK Government position on environmental standards post EU-exit

The UK Government [states that the Environment Bill](#) "will help deliver the government's manifesto commitment to delivering the most ambitious environmental programme of any country on earth". However it is not committed to maintaining specific EU standards,

[stressing that](#) leaving the EU gives the UK the autonomy to set its own future environmental protections. There is accordingly no legal commitment to non-regression or keeping pace with EU law in the Environment Bill.

The [2018 Draft EU Exit Agreement](#) had previously explicitly committed the UK Government to 'non-regression' in the level of environmental protection in place at the end of the transition period, with the aim of ensuring the functioning of the single customs territory. However, references to non-regression of environmental standards do not feature in [the Withdrawal Agreement](#) reached by the EU and the UK Government in October 2019. Instead, the non-legally binding [Political Declaration](#) accompanying it says (emphasis added):

“ The Parties will retain their autonomy and the ability to regulate economic activity **according to the levels of protection each deems appropriate** in order to achieve legitimate public policy objectives such as public health, animal health and welfare, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, and promotion and protection of cultural diversity.”

Where the Scottish and UK Governments seek to take forward aspects of environmental policy and regulation on a joint basis therefore, whilst both Governments have committed to delivering high levels of environmental protection, it may be relevant to consider any implications of different commitments on non-regression and keeping pace.

For example, it could be considered how taking forward areas of environment regulation on a UK-wide basis could impact on the Scottish Government's ability to keep pace with EU law. This issue is discussed further in the [section on Common Frameworks](#) and throughout the briefing.

Common Frameworks and the Bill

In many policy areas, including the environment, EU laws have ensured some level of consistency of approach across the UK, even where these areas are devolved. This is because the UK and all of its governments have had to comply with EU law. In effect, this compliance has meant that the same policy has often been followed.

The UK left the EU on 31 January 2020. There is now a transition period until 31 December 2020. Through the transition period the UK will continue to comply with EU law. After the end of the transition period, there is a possibility of policy divergence because the UK Government and the devolved administrations within the UK will no longer need to comply with EU law.

Common frameworks can be developed so that rules and regulations in certain areas remain the same, or at least similar, across the UK.

A common framework is an agreed approach to a particular policy, including the implementation and governance of it. Common frameworks will be used to establish policy direction in areas where devolved and reserved powers and interests intersect. Developments in common frameworks will be one of the factors which determines how Scotland and the rest of the UK interact post EU exit.

Some common frameworks may be legislative but it is anticipated that the majority will be non-legislative. That means that they will be agreed through memorandums of understanding, concordats and so on, rather than being set out in primary legislation.

There may, however, be provision made in primary legislation which relates to a common framework. Likewise, some regulations (secondary legislation) are likely to make provision which is linked to common frameworks. Until a common framework is explicitly developed, and details are shared by the UK and Scottish Governments, it is unclear what the broader extent of a common framework will be.

The Scottish Government and the Scottish Parliament are working together to produce a protocol for the sharing of information on common frameworks. This is in part to support good scrutiny of the frameworks. Further information on common frameworks can be found on [SPICe's post-Brexit hub](#).

Common frameworks and the environment

Common standards and approaches to environmental regulation in the UK have been heavily underpinned to date by EU law through the setting of a 'regulatory floor'. The Brexit & Environment report, '[Environmental policy in a devolved United Kingdom Challenges and opportunities after Brexit](#)'⁴ discusses the implications of this:

“ The intersection of the devolution settlements with EU membership has allowed for 'upward divergence' in environmental policy across the four UK nations. In particular, the Scottish and Welsh governments have sought to create environmental policies that go beyond the EU's minimum requirements. For example, Scotland has more ambitious targets in the areas of climate and energy policy and plastic waste and has also generally performed better at implementing some EU Directives and going beyond their requirements.”

The UK and devolved governments are developing common frameworks, but none are yet agreed. In April 2019, the UK Government published a [revised frameworks analysis](#) including a breakdown of areas of EU law that intersect with devolved competence, and an indication of what approaches may be taken.

The following areas from this analysis are likely to be relevant to the UK Environment Bill, as frameworks in these areas could be used to set out common goals, standards, or working procedures to govern how delegated powers in the Bill will be used in future:

- **Waste management:** Policies and regulations covering waste and its recovery/ recycling including producer responsibility and the shipment of waste.
- **Waste packaging and product regulations** - Policies and regulations which aim to meet product requirements and set product standards in order to manage waste.
- **Air quality** - Policies and regulations which aim to reduce harmful emissions and concentrations of air pollutants that can damage human health and the environment.
- **Chemicals regulation** - To replace EU Regulations on substance labelling; biocidal products; export and import of hazardous chemicals; registration, evaluation, authorisation and restriction of chemicals (REACH); and pesticides.

Delegated powers in the Bill

The Bill sets out a framework for the protection of the environment. It contains 45 provisions which include delegated powers, set out in [Annex B of the Memorandum from the Department for the Environment, Food and Rural Affairs to the Delegated Powers and Regulatory Reform Committee](#).

The UK Government describe the delegated powers in the Bill as falling into five categories:

1. Powers that are needed as a result of the UK leaving the EU e.g. on environmental governance and principles;
2. Provisions which modify, or are based upon, existing delegated powers;
3. Provisions which create new delegated powers to give effect to new environmental policy e.g. on producer responsibility;
4. Powers for **devolved administration ministers** to make equivalent provision to UK Ministers. Several of the powers in the Bill are powers for both the UK Secretary of State and devolved administrations. Some powers can be exercised by the Secretary of State for the whole of the UK but only with consent of the devolved administrations in relation to a devolved matter. Other powers are for devolved administration Ministers only.
5. General provisions which are required for the Bill to have effect.

As described above, UK Ministers will not generally make regulations in devolved areas without the consent of the Scottish Ministers, and arrangements can be put in place to enable the Scottish Parliament to scrutinise the decision of Scottish Ministers to consent to regulations being made by UK Ministers in devolved areas.

Territorial extent

Clause 130 of the Bill sets out the territorial extent of the Bill.

Most of the Bill applies in England only. However, there are also significant provisions in the Bill which apply to Scotland, Wales and Northern Ireland. A number of the UK-wide provisions create delegated powers where areas of devolved environmental policy are expected (by the Scottish and UK Governments) to be regulated at a UK-wide level to some extent.

In particular this includes UK-wide provisions on waste and chemicals. There are also some UK-wide provisions on air and water quality which have more limited implications in Scotland.

There are some areas in the Bill that extend to Scotland by virtue of their being **reserved areas** - such as on transfrontier shipment of waste and recall of vehicles.

The following summarises the territorial extent and application of key areas of the Bill. “Extent” means the legal jurisdiction within the UK where the provision will form part of the law, that is (i) England & Wales, (ii) Scotland or (iii) Northern Ireland (or a combination of these). “Application” means the part of the country where a provision has practical effect:

- Clauses 1-18 on environmental targets and monitoring and the policy statement on environmental principles and Clause 20 on reporting on international law extend to England and Wales but apply only in England;
- Clause 19 on statements about environmental Bills, and Clauses 21- 24 and 26-44 on the **Office for Environmental Protection** and its functions **extend and apply to the whole of the UK**;
- Clauses 47-50 on **producer responsibility and resource efficiency** and clause 59 on transfrontier shipments of waste **extend and apply to the whole of the UK**;
- Clauses 51 and 52 on deposit returns and single use plastic items extend and apply to England, Wales and Northern Ireland;
- Clauses 71-74 on **environmental recall of motor vehicles** extends and applies to the **whole of the UK**;
- Clauses 75-89 on water and drainage largely apply to England or England and Wales, but there are a number of country specific clauses relating to only one country in the UK, and Clauses 81 and 85 on water quality extend and apply to the whole of the UK.
- Clauses 90-124 on biodiversity and conservation covenants extend to England and Wales but apply only to England;
- Clause 125 on the **regulation of chemicals** extends and applies to the **whole of the UK**.

Annex A of the Explanatory Notes includes a table showing where clauses apply to Scotland and other devolved administrations and where a Legislative Consent Motion (LCM) is being sought. This table is adapted below to show information on which clauses apply to Scotland:

Provisions in the UK Environment Bill which apply to Scotland - adapted from Annex A of the Bill's Explanatory Notes

Provision which extends and applies to Scotland	LCM sought?
Clause 19 (statements about Bills containing new environmental law)	No
Clauses 21-44 and Clause 46 (the Office for Environmental Protection and its functions)	No
Clauses 47-48 (producer responsibility)	Yes
Clauses 49-50 (resource efficiency)	Yes
Clause 55 (electronic waste tracking)	Yes
Clause 59 (transfrontier shipments of waste)	No
Clause 60 (regulations under the Environmental Protection Act 1990)	Yes
Clause 61 (powers to make charging schemes)	Yes
Clause 69 (local air quality management framework)	Yes
- applies 'in part'	
Clauses 71-74 (environmental recall of motor vehicles etc)	No
Clause 81 (water quality: powers of Secretary of State)	Yes
Clause 84 (Solway Tweed river basin district: power to transfer functions)	Yes
Clause 85 (water quality: interpretation)	Yes
Clause 125 (amendment of REACH legislation)	Yes
Clauses 126 - 133 (various consequential provisions including extent, financial provisions, short title)	No
Schedules	
Schedule 1 — The Office for Environmental Protection	No
Schedule 3 — The Office for Environmental Protection: Northern Ireland	No
Schedule 4 — Producer responsibility obligations	Yes
Schedule 5 — Producer responsibility for disposal costs	Yes
Schedule 6 — Resource efficiency information	Yes
Schedule 7 — Resource efficiency requirements	Yes
Schedule 11 — Local air quality management framework (applies in part)	Yes
Schedule 19 — Amendment of REACH legislation	Yes

The Scottish Government's Legislative Consent Memorandum

On 27 May 2020 the Scottish Government [lodged a Legislative Consent Memorandum](#) in the Scottish Parliament. The main points of this document are that -

- The Memorandum has been lodged by Roseanna Cunningham MSP, Cabinet Secretary for Environment, Climate Change and Land Reform, under Rule 9.B.3.1(a) of the Parliament's Standing Orders.
- The Scottish Government intends to lodge a Legislative Consent Motion in relation to the Bill - whilst emphasising that in doing to it is "not endorsing the UK Government's policy on non-regression and divergence from EU standards". The Scottish Government further states that it "would not consent to legislation where a UK Bill reduces environmental standards in a devolved area".
- In relation to provisions on environmental governance, where an LCM is not sought by the UK Government, the Scottish Government agrees that consent is not required, but raises some concerns about the potential remit of the Office of Environmental Protection in Scotland.
- The Scottish Government is content that devolved competence is respected in relation to detailed provisions on waste, air quality, water and chemicals, and recommends the Parliament consents to the Bill as set out in the memorandum.

Further statements from the Legislative Consent Memorandum are highlighted in relation to the relevant provisions throughout the briefing.

Part 1: Environmental governance

The first part of the Bill contains measures to address **environmental governance gaps** following withdrawal from the EU.

The key clauses in this Part of the Bill that apply in Scotland relate to the establishment of a new Office of Environmental Protection (OEP) for the UK. It also makes provision for the setting for England of long-term, legally binding environmental targets - these are linked to the UK Government's 25 Year Environment Plan and are not applicable in Scotland.

Legislative consent is not being sought in respect of any clauses in Part 1. Clauses that apply in Scotland are:

- Clause 19 (statements about Bills containing new environmental law)
- Clauses 21-24 (the Office for Environmental Protection)
- Clauses 25-27 (the OEP's scrutiny and advice functions)
- Clauses 28-38 (the OEP's enforcement functions)
- Clauses 39-40 (information)
- Clauses 41-44 (interpretation of Part 1)

The following sections consider these clauses in some detail because, although an LCM is not being sought in respect of them, there are implications for Scotland both in terms of understanding the remit that a new UK environmental watchdog will have, and how it may interact with future governance arrangements in Scotland.

Part 1 of the Bill also includes provisions to bring EU **environmental principles into domestic law in England**. Whilst these provisions do not apply in Scotland, they are briefly discussed.

Clause 19: Statements about Bills containing new environmental law

This clause applies in Scotland and no LCM is being sought by the UK Government.

Clause 19 requires that, where a Bill introduced into either UK House of Parliament contains a provision that would be environmental law, the Minister in charge of the Bill must make a statement to that House setting out, in writing, that the Minister's view is that the Bill does not reduce environmental protection. Alternatively, the statement could set out that the Minister cannot make such a statement but the UK Government still wishes to proceed.

For the purposes of clause 19, the meaning of environmental law is defined in clause 43, as any legislative provision mainly concerned with environmental protection, and not concerned with an excluded matter. Excluded matters are disclosure of or access to information, the armed forces or national security, taxation, spending or the allocation of resources within government.

This definition therefore covers also covers environmental law in devolved areas which are within the legislative competence of the devolved legislatures. This definition is specific to clause 19: for all the other clauses in Part 1 of the Bill, the definition of “environmental law” excludes devolved legislative provision.

In the [Legislative Consent Memorandum](#), the Scottish Government states that this provision "provides little reassurance of the UK Government’s commitment to future standards" and reflects the UK Government’s "policy to reject any commitment to future alignment with EU Standards".

Background and stakeholder reactions

Clause 19 is a new clause in the Bill compared to the 2019 Environment Bill which fell due to the General Election. It was introduced in response to calls from environmental groups to strengthen the Bill to safeguard against the weakening or 'regression' of environmental standards following EU exit ⁵.

The UK Parliament's Environmental Audit Committee had also recommended [in its report on the Draft Bill in April 2019](#) that a binding non-regression provision should be included.

This new clause has been generally described by environmental groups as a positive step, but also criticised for not going far enough to secure non-regression of environmental standards. For example, [the Chartered Institution of Water and Environmental Management said](#) that while the clause (in combination with new clause 20) enables some scrutiny of the Government if potentially weakening environmental standards, there is no recourse were this to be so. Environmental NGOs are continuing to call for inclusion of a further 'non-regression' provision in the Bill ^{6 7 8}.

Stakeholders have also raised concerns about the definition of environmental law in the Bill and its exclusions, such as whether all matters related to taxation should be excluded. In [evidence to the Public Bill Committee on 12 March 2020](#), Scottish Environment LINK said that exceptions should be based not on broadbrush areas, but on the degree of justification for why environmental issues have "to be overwritten" e.g. for reasons of national security.

Clauses 21-40: The Office for Environmental Protection

Clauses 21-40 on the Office for Environmental Protection, as well as the related Schedules 1 and 3, apply in Scotland and no LCM is being sought in respect of them.

Chapter 2 of Part 1 of the Bill creates a new public body, a 'body corporate' called the Office for Environmental Protection (OEP). The aim is to establish a domestic independent watchdog who will be responsible for taking action on breaches of environmental law. The OEP will have scrutiny, advice and enforcement functions and will be set up as a Non-Departmental Public Body (NDPB) ⁹.

The OEP's remit will cover England and Northern Ireland, and extend to Scotland and Wales in respect of reserved matters. **The remit of the OEP in Scotland is expected to**

be fairly limited because in general, the environment is a devolved area. The Scottish Government [conducted its own consultation on environmental governance and principles in 2019](#), and is expected to include provisions on governance in the forthcoming Continuity Bill. There is further discussion below of what the remit of the OEP in Scotland could be in practice.

The [UK Government's position](#) is that the Bill "sets out the measures needed to ensure that there is no environmental governance gap on withdrawal from the EU". The UK Government [consulted on its environmental governance proposals](#) in 2018. More background can be found in the [House of Commons Library briefing](#) on this Bill ¹⁰.

The Welsh Government also [consulted on environmental governance and principles](#) in 2019. An [update from the Welsh Government in November 2019](#) said that an Environmental Governance Stakeholder Task Group was working on governance models.

How will the OEP function?

Key aspects of the OEP established by the Bill include the following. References here to "environmental law" exclude devolved environmental provision:

- The OEP's **principal objective** is to contribute to environmental protection and the improvement of the natural environment and it must prepare a strategy that sets out how it intends to exercise its functions (clause 22);
- The OEP must **monitor progress** with environmental improvement plans and other defined environmental targets (clause 25);
- The OEP must **monitor the implementation of environmental law** and may report on any matter concerned with its implementation, which the UK Secretary of State must respond to (clause 26);
- The OEP must **give advice** to a Minister of the Crown about changes to environmental law if requested and may advise on proposed changes (clause 27).
- A **complaints procedure** enabling any person to make a complaint where they believe that a public authority has failed to comply with environmental law (clause 29).

Appointments and membership:

Schedule 1 sets out that the non-executive members of the OEP Board are to be appointed by the Secretary of State, including the Chair. In making appointments, the Secretary of State must have regard to the desirability of experience in environmental law, science, policy, and enforcement.

Funding

Schedule 1 (paragraph 12) provides that the Secretary of State must pay to the OEP such sums as the Secretary of State "considers are reasonably sufficient to enable the OEP to carry out its functions", and may provide further financial assistance to the OEP.

The OEP's enforcement functions

Enforcement functions and tools available to the OEP are:

- It may carry out an **investigation** into whether a public authority has failed to comply with environmental law, on receipt of a complaint or of its own accord (clause 30);
- It may give an **information notice** to a public authority where it suspects a serious breach of environmental law, requesting information (clause 32);
- Where the OEP is satisfied that a public authority has failed to comply with environmental law and that failure is serious, it can issue a **decision notice** setting out the failure and steps considered necessary to remedy the failure (clause 33);
- It may **bring legal proceedings** by applying to the Upper Tribunal for an '**environmental review**' (clause 35), a new bespoke procedure. Where the court finds the authority to be in breach of the law, it may grant any remedy that could be granted by a court on judicial review other than damages.
- The OEP may apply for **judicial review** in relation to the conduct of a public authority if considered necessary to "prevent, or mitigate, serious damage to the natural environment or to human health" (clause 36). In Scotland, a judicial review would be brought in the Court of Session.

Pre-legislative scrutiny of the OEP provisions

Section 16 of the [EU \(Withdrawal\) Act 2018](#) required the UK Government to publish a draft Bill by 26 December 2018 including environmental principles and governance provisions. The Government published the [draft Environment \(Principles and Governance\) Bill](#) on 19 December 2018. This draft Bill was the subject of pre-legislative scrutiny by the UK Parliament Environmental Audit Committee (EAC) and the Environment, Food and Rural Affairs (EFRA) Committee.

Their reports set out concerns about the independence and enforcement powers of the proposed OEP and questioned whether they would achieve equivalence with pre-EU exit arrangements. The [EFRA Committee's report](#) stated that in some areas the provisions "mark a significant regression on current standards."¹¹ The [EAC's report](#) welcomed the Government's ambition to establish a "world-leading" body, but said the proposals "fall woefully short of this"¹². Recommendations of these Committees included:

- The Government should revise the **appointments process** to ensure greater independence - the Chair should be appointed with the consent of the EFRA Committee, subject to a pre-appointment hearing.
- The Government should commit to a **multi-annual budget** for the OEP in the Bill, noting a history of sustained budget cuts to UK environmental agencies.
- On enforcement, the Bill needs to give the watchdog 'sharper teeth' given the power to fine of the CJEU is not being replicated. Given judicial review largely focusses on process and not the substance of a decision, the OEP will need a bespoke **enforcement procedure**.
- The OEP should be able to issue **emergency or interim measures** in urgent cases.
- The Government should set out how it intends for the OEP to work with potential equivalent bodies in Wales and Scotland, and should **clearly set out which provisions are within the scope of the OEP in respect of reserved matters**;

- **“Independent”** should be added to the list of requirements for the OEP to follow.

The UK Government's response

Part 1 of the Bill updates the 2018 Draft Bill in light of this scrutiny. [The UK Government agreed](#) that the OEP "should have sufficient independence from government" and added a new statutory duty to the Bill on the Secretary of State, in exercising functions in respect of the OEP, to have regard to the need to protect its independence (Schedule 1, paragraph 17). It also made a political commitment that the OEP will be provided with a five-year indicative budget.

The UK Government also agreed that the UK Parliament should have a key role in "making significant public appointments to organisations which hold the Government to account" but that ultimate decisions should be made by Ministers. It therefore agreed to invite the EFRA Committee to hold a pre-appointment hearing with the preferred candidate for Chair, and said that the Secretary of State will "duly consider the Committee's recommendations".

Remit of the OEP in Scotland

The implication of establishing an OEP with a potential remit in Scotland, is that there are areas of environmental law or policy that are reserved, which are the responsibility of public bodies or by the UK Government.

The Scottish Government, however, has expressed concerns that it is not clear on the scope of the OEP's powers in Scotland. The Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham MSP, [wrote to the Chair of the EAC on 26 February 2019](#) and said:

“ Environmental law is defined in the draft Bill as law primarily concerned with the protection of the environment. Any law that could be made by the Scottish Parliament is excluded. Given that the definition of environmental law in this Bill so closely matches the "purpose test" for judging whether a measure is devolved, it is difficult to understand the scope of these OEP powers. I think that it would be helpful if the UK Government could give examples of situations that these provisions would cover, and compare these new arrangements with what is currently in place. ”

Environmental law is defined in the Bill in clause 43 (1), as any legislative provision to the extent that it is mainly concerned with environmental protection, and is not concerned with an excluded matter. Clause 43 (3) sets out that the reference in subsection (1) to "legislative provision" does not include devolved legislative provision (except for the purposes of clause 19 on statements about Bills containing new environmental law), so does not include legislative provision contained in, or in an instrument made under, an Act of the Scottish Parliament, or legislative provision which if contained in an Act of the Scottish Parliament, would be within its legislative competence.

The [Legislative Consent Memorandum](#) states that "It is important to note that this exclusion includes matters that are currently provided for under UK legislation, but which could be legislated for by the Scottish Parliament".

There may also be questions arising on whose remit would be triggered i.e. the OEP or a future environmental governance body established in Scotland where UK Ministers act

with the consent of Scottish Ministers in a devolved area. Those functions appear to be excluded from the OEP's remit as they are devolved. It is unclear whether a future environmental governance body in Scotland may seek to have oversight and enforcement powers in relation to UK Ministers acting in devolved areas.

In the [Legislative Consent Memorandum](#) the Scottish Government also raises concerns that the extension of the OEP's remit to Scotland in reserved areas of environmental law "creates a potentially confused position", and states that "It would have been preferable if the UK Government had agreed that the position in very small areas of reserved law in Scotland could have been governed by the body that will be set up in the Continuity Bill to govern devolved environmental law".

In [evidence to the Public Bill Committee on 12 March 2020](#), Scottish Environment LINK said there was a need for more transparency over which functions are considered to be reserved, saying this "is not very clear to citizens". The Law Society of Scotland similarly raised uncertainty around reserved matters and the OEP, and suggested its remit could be triggered in relation to product labelling and product standards which are generally reserved, and areas where there is a complicated mix of reserved and devolved issues such as chemicals regulation. They said there was a "need to ensure that no gaps are left".

On specific areas where the OEP may have a remit in Scotland, [the UK Government said in its response to UK Parliament Committee scrutiny of the Draft Bill](#) ¹³ :

“ The executive competence of certain functions can also be transferred between the administrations through transfer orders under the devolution settlements and other legislative instruments, and as such the boundaries between devolved / reserved matters may change over time. The OEP may need to make a legal judgement about whether an alleged breach is a reserved or devolved matter on a case by case basis, and we expect it would do so in collaboration with the relevant equivalent bodies in the devolved nations (as described above). Such legal judgements may often be complex and finely balanced, therefore we do not consider that setting out all reserved matters that the government currently considers to be reserved would be particularly valuable.”

The Bill enables the Secretary of State to determine whether a particular legislative provision is, or is not, within the definition of “environmental law”. The Secretary of State would exercise this power by making regulations under clause 43(5). Before making such regulations, the Secretary of State must consult the OEP and any other persons the Secretary of State considers appropriate (clause 43(6)). If this power were to be exercised to clear up an ambiguity over whether a particular legislative provision is devolved for the purposes of the OEP's remit, the Secretary of State may consider it appropriate to consult the relevant devolved administration, but there would be no statutory requirement to do so.

Co-operation with the OEP

Clause 24 of the Bill establishes a duty on public authorities to co-operate with the OEP. The duty excludes devolved legislatures, Scottish Ministers, and persons who exercise only devolved functions. The duty therefore does not apply to any person or body whose functions are wholly devolved. However, if only some of their functions are devolved, they need only comply with the duty in relation to their non-devolved functions.

Clause 24(4) anticipates future relationships between the OEP and any **future environmental governance bodies** set up in devolved areas. It provides that the OEP should consult a devolved environmental governance body if the work it is undertaking would be relevant to them. Clause 40(2)(f) also enables the OEP to share certain information with such bodies which might otherwise be confidential.

The [UK Government expects](#) that this duty would be triggered in relation to transboundary issues, or in specific cases where competences may overlap. It also said that it expected that "these powers and duties would be reciprocated by the Devolved Administrations when establishing their equivalent bodies".

In evidence to the [Public Bill Committee on the Environment Bill on 10 March 2020](#), the Institute of Environmental Management and Assessment said that mechanisms to ensure collaboration between environmental governance bodies in the UK will be important especially in relation to transboundary issues. Speaking to the same Committee on 12 March, [Environmental Protection Scotland said](#) there should be a memorandum of understanding between the future body in Scotland and OEP. Scottish Environment LINK suggested that collaboration could be encouraged via an amendment to the Bill requiring the OEP to set out how it plans to work with future bodies in Scotland and Wales.

Stakeholder reactions

Whilst setting up a new environmental watchdog is strongly supported by environmental NGOs, concerns have been raised about the details (see e.g. briefings by [Greener UK](#)¹⁴, [Aldersgate Group](#), and [the RSPB](#)⁷). Concerns principally relate to the following areas:

- **Independence of appointments:**

As set out above, in response to concerns raised about independence during scrutiny of the Draft Bill, the UK Government introduced a new duty on the Secretary of State to have regard to the need to protect the OEP's independence, and made a political commitment to a pre-appointment hearing. [Greener UK and Wildlife and Countryside LINK said](#) that these measures "are not yet sufficient to ensure the independence of the body in the long term". [Aldersgate Group](#) said that the Bill needs to set out a formal role for a parliamentary committee in approving the OEP Chair.

- **Independence of funding:**

The [RSPB have said](#) that given the OEP's budget will be largely controlled by the Government, this raises concerns about its ability to hold it to account. [Greener UK and Wildlife and Countryside LINK](#) welcomed the UK Government's political commitment to provide the OEP with a five-year budget, but said this should be put in the Bill.

- **Its remit and powers of enforcement:**

[Greener UK](#) welcomed the Government's "attempt to design a bespoke enforcement process" via the environmental review process, but said the process is too similar to judicial review i.e. focused on procedural aspects of law and must also consider matters of fact. They also recommend that members of the public should also be able to initiate an environmental review. [The RSPB have said](#) that enforcement proposals are not robust enough, particularly because the OEP and courts do not have the power to impose fines.

Clauses 16-18: Environmental principles

Clauses 16-18 of the Bill on environmental principles do not apply to Scotland and an LCM is not being sought in respect of them.

However, it is relevant to consider the provisions to enable comparisons with how the Scottish Government takes forward commitments on environmental principles.

Clauses 16-18 of the Bill require the publication of a policy statement on environmental principles setting out how they are to be interpreted and applied by Ministers of the Crown during policymaking. “Environmental principles” in the Bill means:

- the principle that environmental protection should be integrated into the making of policies;
- the principle of preventative action to avert environmental damage;
- the precautionary principle, so far as relating to the environment;
- the principle that environmental damage should as a priority be rectified at source;
- the polluter pays principle.

The Scottish Government's [consultation on governance and principles](#) proposes a new legal duty on Scottish Ministers to have regard to 'the four EU environmental principles' - i.e. the latter four in the above list, which are the four environmental principles enshrined in Article 191(2) of the [Treaty on the Functioning of the European Union](#). It does not propose to include the first principle, known as the 'integration principle', which the consultation states is derived from the UN Rio Declaration on Environment and Development 1992.

There is likely to be discussion about what impact the environmental principles set out in the Bill could have in Scotland in relation to both reserved areas, and devolved areas that are regulated on a UK-wide basis. It will be necessary to consider which set of principles, and associated guidance, would apply in complex areas of devolution - for example in relation to decision-making on marine planning or licensing in Scottish offshore waters (12-200nm) [which is executively devolved, not legislatively](#)ⁱ.

The Law Society of Scotland said in [evidence to the Public Bill Committee on the Environment Bill on 12 March 2020](#) that as the Bill provides for environmental principles to apply in England only, it is not clear how reserved functions of UK Ministers in Scotland will be covered. Scottish Environment LINK said that this seems to be a gap in the Bill and encouraged the Scottish and UK Governments to work together to agree a statement about how principles will apply coherently.

More background on the role of EU environmental principles can be found in [the SPICe briefing Environmental Governance in Scotland after EU Exit](#).

ⁱ “Executive devolution” describes the situation in which functions which relate to reserved matters are given to the Scottish Ministers to carry out. Executive devolution of a matter does not give the Scottish Parliament the competence to legislate in relation to that matter.

Part 2: Environmental Governance: Northern Ireland

Part 2 of the Bill contains provisions on environmental improvement plans and environmental principles in Northern Ireland.

Clause 46 in Part 2 gives effect to Schedule 3 of the Bill, which makes provision about the functions of the OEP in Northern Ireland.

Clause 46 applies in Scotland and no Legislative Consent Motion is being sought.

The reason this Clause applies in Scotland is because clause 46 gives legal effect to Schedule 3, and two of the provisions in Schedule 3 extend to and apply in Scotland (and the rest of the UK), as set out in clause 130(2). These are:

- paragraph 16, which concerns disclosures to the OEP. This would enable (but not require) persons in Scotland to share information with the OEP;
- paragraph 17(7) which concerns the confidentiality of information held by the OEP and correspondence between the OEP and a relevant public body which is “environmental information” for the purposes of the Environmental Information (Scotland) Regulations 2004.

Part 3: Waste and Resource Efficiency

Waste is generally a devolved area. However, a number of areas of waste policy and regulation have been pursued at UK-level, for example due to UK internal market reasons. Some areas of waste regulation are reserved because they fall under reserved areas of product standards, or import and export control.

Clauses that apply in Scotland in Part 3 and for which an LCM is being sought are:

- Clauses 47 and 48 on producer responsibility (which introduce Schedules 4 and 5)
- Clauses 49-50 on resource efficiency (which introduce Schedules 6 and 7)
- Clause 55 on electronic waste tracking
- Clause 60 on regulations under the Environmental Protection Act 1990
- Clause 61 on powers to make charging schemes

Clauses that apply in Scotland in Part 3 and for which no LCM is being sought are:

- Clause 59 on transfrontier shipments of waste.

Background: The EU Circular Economy Package

In 2015, the European Commission put forward a package to support the EU's transition to a circular economy: the [EU Circular Economy Package \(CEP\)](#). It includes a revised [waste legislative framework](#) which entered into force in July 2018, which includes recycling targets and strengthened waste prevention and management measures in a number of areasⁱⁱ.

The Bill and its explanatory notes do not make reference to the EU CEP, however a number of clauses in the Bill take forward elements of the CEP and in 2019, the UK Government [expressed intentions to bring these new EU waste requirements into UK law](#). The UK Government's 2018 [Our Waste, Our Resources Strategy](#) for England said the Government "will explore whether more stretching targets, over and above those proposed by the EU, can be developed"¹⁵, whilst emphasising that legislation should be tailored to domestic needs.

UK environmental NGOs are generally supportive of the measures in the EU CEP. Green Alliance published [a report on the UK resource strategy after Brexit](#) recommending that the UK as a whole should adopt the CEP and go beyond it.

ii Amendments were made to [Directive 2008/98/EC](#) or the 'Waste Framework Directive', [Directive 94/62/EC](#) on packaging and packaging waste, [Directive 2000/53/EC](#) on end-of-life vehicles, [Directive 2006/66/EC](#) on batteries and accumulators and waste batteries and accumulators and [Directive 2012/19/EU](#) on waste electrical and electronic equipment.

Clauses 47 - 48: Producer responsibility

Clauses 47 and 48 on producer responsibility, and Schedules 4 and 5, extend and apply to Scotland and an LCM is being sought in respect of them.

What is producer responsibility?

Producer responsibility is about ensuring that those who produce products and put them onto the market are responsible for their end of life management. The concept of Extended Producer Responsibility (EPR) is typically understood to involve a further shift in responsibility from the public sector to producers, as well as encouraging more consideration of environmental impacts at design and manufacture stages¹⁶.

What does the Bill do?

The Bill introduces delegated powers to make Regulations for producer responsibility schemes which could be used to make producers responsible for the full net cost of recovery of their products, linked to targets for reuse, redistribution, recovery and recycling¹⁰.

These powers replace and update producer responsibility measures in section 93 to 95 of the [Environment Act 1995](#). The changes also clarify that producer responsibility can include prevention of waste and redistribution, making it clear that action can be taken on food waste.

Clause 47: Producer responsibility obligations

Clause 47 introduces Schedule 4, which allows the 'relevant national authority' to make regulations about producer responsibility obligations and enforcement of those. The 'relevant national authority' means the Secretary of State or the Scottish Ministers. Where the Secretary of State make regulations for Scotland, the Scottish Ministers' consent is required.

This means that a UK-wide producer responsibility scheme could be taken forward **either via parallel regulations by the UK and devolved Governments, or by UK Regulations with the consent of devolved authorities.**

Schedule 4 paragraph 1 (2) sets out that **regulations may be made only for the purpose of—** (a) preventing a product or material becoming waste, or reducing the amount of a product or material that becomes waste; or (b) sustaining a minimum level of, or promoting or securing an increase in, the re-use, redistribution, recovery or recycling of products or materials.

Regulations made under this Schedule would be subject to the [affirmative procedure](#), unless they only provide for updated targets.

Clause 48: Producer responsibility for disposal costs

Clause 48 introduces Schedule 5, which allows the relevant national authority to make regulations that require those involved in manufacturing, processing, distributing or supplying products or materials to meet, or contribute to, the disposal costs of those products.

Again, the clause confers powers on Scottish Ministers to make regulations for Scotland, or Secretary of State may make regulations on behalf of Wales, Scotland, or Northern Ireland, but only with the relevant Ministers' or Department's consent. Regulations made under Schedule 5 would be subject to the [affirmative procedure](#) .

The [Legislative Consent Memorandum](#) states that the Scottish Government is "content for the UK government to legislate in this area, subject to the consent of the Scottish Ministers, because the present extended producer responsibility schemes operate on a UK-wide basis".

It also states that the Scottish Government is continuing to work with the UK Government and other devolved governments on major reforms in this area and a consultation is expected later this year (further background below).

Background to producer responsibility clauses

The [EU Circular Economy Package](#) sought to encourage the development of EPR through setting minimum operating requirements for any scheme.

Producer responsibility has to date generally been pursued on a UK-wide basis. UK-wide producer responsibility schemes are already in place for four waste streams: packaging waste, waste electrical and electronic equipment (WEEE), batteries and end of life vehicles (ELVs). These schemes put a certain level of financial responsibility on producers for their goods at end of life but have not typically achieved full cost recovery.

The **current UK-wide producer responsibility system for packaging** has been in place since 1997, stemming from [EU Directive 94/62/EC](#) on Packaging and Packaging Waste. It operates UK-wide under [the Producer Responsibility Obligations \(Packaging Waste\) Regulations 2007](#) (as amended), [the Packaging \(Essential Requirements\) \(Amendment\) Regulations 2015](#) and parallel Northern Ireland regulations. The regulations place an obligation on companies who supply packaging to ensure that a specified amount of packaging waste is recovered or recycled each year.

The [National Audit Office reviewed the scheme](#) in 2018, and concluded that while packaging recycling has increased over the lifetime of the system, there is no evidence that it has encouraged companies to minimise packaging or make it easy to recycle, and it relies on exporting materials to other parts of the world without adequate checks ¹⁷ .

More information on other UK producer responsibility schemes can be found [on the UK Government website](#).

Joint UK and devolved Governments consultation

The UK Government's [25 Year Environment Strategy](#) committed to develop producer responsibility, and the [Our Waste, Our Resources Strategy for England](#) expanded on this, laying out a set of principles for EPR including that producers should bear the full net cost of managing products at the end of their life.

The UK Government consulted in 2019 on reforming packaging producer responsibility jointly with the Scottish and Welsh governments, and on behalf of the Northern Ireland Department of Agriculture, Environment and Rural Affairs. On the UK-wide nature of the proposals, [the consultation stated](#):

“ The devolved system of government means each government is accountable to their citizens and devolved powers must be respected. Many manufacturers and retailers operate as part of UK-wide supply chains and have told us of their preference for a consistent approach across the UK to be retained.”

A [summary of responses and next steps was published in July 2019](#), which set out plans to introduce EPR for packaging by 2023.

Scottish Government policy

The Scottish Government's 2016 circular economy strategy, '[Making Things Last](#)' commits to exploring a new approach to producer responsibility through a single framework that drives reuse, repair and remanufacture, while more fully addressing costs of recycling and disposal. Over and above existing schemes, it states the Scottish Government will prioritise schemes for tyres, furniture and mattresses. The strategy states that its proposals "complement those in the EU Circular Economy Package".

The Scottish Government indicated in its [2019 consultation on proposals for circular economy legislation](#) that it was anticipating legislation for producer responsibility would be taken forward largely on a UK-wide basis.

Stakeholders views

UK-wide stakeholder views

In [evidence to the Public Bill Committee on the Environment Bill on 12 March 2020](#), Greener UK welcomed the clauses on producer responsibility, but also raised concerns that the focus is still on disposal, not moving up the 'waste hierarchy' to address issues at production stage. In the same session, witnesses discussed to what extent the measures in Bill follow the CEP. Keep Britain Tidy said that, as is always the case with enabling legislation, "the devil will be in the detail of the statutory instruments".

Scottish stakeholders

The ECCLR Committee [discussed producer responsibility with stakeholders on 04 June 2019](#). Zero Waste Scotland expressed support for expanding producer responsibility, stating that the current packaging producer responsibility scheme recovers only about 10-15% of the costs of managing waste. Regarding taking regulation forward on a UK-wide basis, Zero Waste Scotland said that the picture with packaging across the UK is complex, so it makes sense to try to work within a UK scheme, but there could be challenges where the ambitions of Scottish and UK ministers are not the same.

The Scottish Government-appointed Expert Panel on Environmental Charging and Other Measures [discussed priorities for EPR](#) with Zero Waste Scotland and the Scottish Environment Protection Agency (SEPA) in 2018. Products identified as priorities for EPR to deliver environmental as well as economic and social benefits were: tyres, mattresses, furniture, carpets, plasterboard, clothing and textiles.

Clauses 49-50: resource efficiency

Clauses 49-50 and Schedules 6 and 7 on resource efficiency apply and extend to Scotland and an LCM is being sought in respect of them.

The UK Government's [policy statement on the Bill](#) says in respect of these provisions:

“ New government powers to set resource-efficiency standards for products will help drive a shift in the market towards products that can be more easily recycled, as well as products that last longer and which can be re-used and repaired more easily. ”

Clause 49 introduces Schedule 6 of the Bill, which gives the 'relevant national authority' the power to make regulations that set requirements for manufacturers and producers to provide **information about the resource efficiency** of their products.

Schedule 6 sets out the meaning of “information about resource efficiency” and specifies the type of information that may be covered - which includes the expected life of the product, aspects of its design and manufacture including materials used and emissions intensity, and the ability to repair or cost of repairing the product.

Clause 50 introduces Schedule 7, which confers powers on the relevant national authority to make regulations about **resource efficiency requirements and enforcement**.

Similarly to the provisions for producer responsibility, delegated powers in clauses 49 and 50 are **shared powers** - Scottish Ministers may make Regulations under these powers as the relevant national authority in Scotland, where that is within the legislative competence of the Scottish Parliament, or Regulations could be made by the UK Secretary of State which apply in Scotland, if Scottish Ministers consent.

Regulations can prohibit products being distributed, sold or supplied if requirements are not met, and may impose requirements in relation to any type of product- with specified exceptions for energy related products, human and veterinary medicines and food (Schedule 7, paragraph 1(2)).

Regulations made under either Schedule must be made under the **affirmative procedure**.

The [Legislative Consent Memorandum](#) states that the Scottish Government is "content with this approach on the basis that it respects devolved competence, and are content for the UK government to legislate in this area because it may be an area in which we wish UK-wide standards to be established".

Background to resource efficiency clauses

The **EU CEP** includes significant work-streams and requirements related to resource efficiency and 'ecodesign'. Pre-existing EU laws under the [Ecodesign Framework Directive](#) require manufacturers of certain products to meet minimum energy efficiency standards. In its [Ecodesign Working Plan 2016-2019](#) the Commission indicated it would explore new requirements in areas such as durability, ability to repair and upgrade, ease of reuse and recycling. The Commission then adopted [ten ecodesign implementing regulations](#) in 2019, incorporating circular economy requirements in several regulations, including for refrigerators, washing machines, dishwashers, televisions, and light sources.

UK Government policy

The UK Government's [25 Year Environment Plan](#) committed to a goal of zero avoidable waste by 2050 and doubling resource productivity. The 2018 [Our Waste, Our Resources](#) Strategy for England set out further detail. It states (emphasis added):

“ Through similar mechanisms to the EU Ecodesign system we will seek to drive change in product standards by gradually removing from the market the least resource efficient products and demanding a certain level of resource efficiency. **We will match or where economically practicable exceed the ambition of the EU’s Ecodesign standards** which to some extent currently allow for material efficiency standards, by legislating to expand the scope to cover more resource intensive product groups, such as textiles and furniture. We will also explore using this mechanism to mandate that spare parts be made available for repair. ”

Scottish Government policy

The Scottish Government's 2016 Circular Economy Strategy '[Making Things Last](#)' supports a life-cycle approach to design of products and packaging, with products designed for long lifetimes, able to be disassembled, repaired and recycled.

Stakeholder views

Greener UK welcomed the introduction of new powers on resource efficiency [in evidence to the Public Bill Committee on 12 March 2020](#). They raised a concern however, and sought clarification from the UK Government about whether equivalent powers will be introduced for energy-using products, stating that this is one of the fastest growing waste streams.

Clause 55: electronic waste tracking

Clause 55 on electronic waste tracking applies in Scotland and an LCM is being sought.

Clause 55 inserts a new section 34CA into [the Environmental Protection Act 1990](#) to create powers to introduce electronic waste tracking i.e. the digital tracking of waste in England, Wales and Scotland. The power is conferred on the the 'relevant national authority' - Scottish Ministers in Scotland.

The regulations could require waste controllers and regulation authorities (SEPA in Scotland) to ensure specified information, such as how waste is processed, treated or moved, is entered into a digital system. The regulations may include provision about who is to operate the system and how information is to be accessed.

Unlike the provisions on resource efficiency and producer responsibility, there is no power for UK-wide regulations to be made by UK Minister with the consent of devolved administrations. Therefore, any co-ordinated UK programme will rely on parallel measures i.e. Regulations made by the different administrations.

The Bill makes further provision about enforcement, allowing regulations to be made to create criminal offences, and related to civil sanctions, and an appeals process.

Regulations made under these provisions would be subject to the **affirmative procedure** for the first set of regulations made by each national authority, and for subsequent regulations which include:

- the creation of a criminal offence
- increase to the maximum penalty for a criminal offence
- creation of a civil sanction
- amendment or revocation of primary legislation or retained direct principal EU legislation.

Otherwise they would be subject to the **negative procedure** ¹⁸.

The **Legislative Consent Memorandum** states that a new electronic system for tracking waste is currently being developed by the UK Government with the active participation of the Scottish Government and SEPA. It notes that the Scottish Government set out its intention to move towards electronic waste management in its circular economy strategy, **Making Things Last**, and that given there are significant movements of waste across the UK, there are benefits of working on a UK-wide system (although the regulation-making powers are separate).

Background to electronic waste tracking clause

EU Circular Economy Package

The EU CEP **introduced new requirements in waste directives** for the electronic tracking of waste, driven by a recognition that management of hazardous waste was a problem in the EU and there was a need to increase traceability. An amendment to **the Waste Framework Directive** required Member States to set up an electronic registry for specified hazardous waste, and encouraged registries for other waste streams.

Waste tracking in Scotland and the UK

Current systems for tracking controlled waste in the UK are largely paper based, relying on “waste transfer notes” which record individual transfers but do not track overall movement. For hazardous waste (known as **special waste** in Scotland), a system of consignment notes is in place. In recognition of the limitations of the system, SEPA already accept the use of electronic tracking for some special waste ¹⁹ but there is no legislative framework for this.

A 2018 independent review of **Serious and Organised Waste Crime** in the UK looked into the 'increasing issue' of waste crime, including fly-tipping, illegal dumping, deliberate misdescription of waste, illegal waste management sites, and illegal export. It was estimated that in 2015 illegal waste activity cost over £600 million in England ²⁰. The review found that the lack of digital record-keeping in the waste industry is frequently exploited by organised criminals to hide systematic mishandling, and recommended that mandatory electronic tracking should be introduced.

Zero Waste Scotland estimated in a 2017 review that flytipping alone directly costs local authorities and enforcement agencies at least £11m per year in Scotland ²¹.

SEPA is [developing and piloting tools](#) to help gather intelligence and develop interventions designed to tackle waste crime and is a participant in the [GovTech Catalyst Waste Tracking Challenge](#) project in collaboration with other UK agencies. SEPA also participated in an [EU LIFE funded project](#) with other UK and EU agencies which explored implications of authorities using tracking devices to trace waste.

Clause 59: Transfrontier shipments of waste

Clause 59 on transfrontier shipments of waste applies in Scotland and an LCM is not being sought by the UK Government.

Import and export control, with some exceptions, is a reserved matter under [section C5 of Schedule 5 of the Scotland Act 1998 \(as amended\)](#).

Clause 59 of the Bill amends section 141 of the Environmental Protection Act 1990 to allow regulations to be made by the UK Secretary of State to regulate waste imports or exports or the transit of waste for export.

The UK Government's [Resources and Waste Strategy for England](#) proposed to consult on regulations to explore ways to improve the quality of waste exported for recycling, for example through increased monitoring of shipments. A [written statement on the Environment Bill](#) on 30 January 2020 said that the Government intends to use these powers to ban the export of polluting plastic waste to non-OECD countries.

Clause 60: Regulations under the Environmental Protection Act 1990

Clause 60 applies to Scotland and an LCM is being sought in respect of it.

Clause 60 amends the Environmental Protection Act 1990 by inserting new section 160A, and making consequential amendments to other sections of the Act. These changes consolidate the parliamentary procedure requirements for regulations and orders under the Act, including for regulations and orders made under new powers in the Environment Bill.

The effect of clause 60 on existing powers in the 1990 Act is to keep the requirements the same but to re-state them in simpler way.

The effect of clause 60 on new powers which the Bill inserts into the 1990 Act is that the new powers are subject to the negative procedure. However, none of these powers applies to Scotland. The parliamentary procedure for the new powers which this Bill creates which do apply to Scotland is noted under the relevant sections in this briefing.

Clause 61: powers to make charging schemes

This clause extends and applies to Scotland and an LCM is being sought in Scotland.

Clause 61 makes amendments to sections 41 and 56 of the Environment Act 1995 to supplement existing charging powers available to the Environment Agency, Natural Resources Wales, **and SEPA**. These amendments relate to charging schemes and environmental licences for producer responsibility schemes ([discussed earlier in the briefing](#)), enabling agencies to make charging schemes to recover enforcement costs.

The [House of Commons Library Bill briefing](#) states in respect of this clause that:

“ These agencies can already charge producers fees for the current schemes they regulate. However, for each scheme, this happens in different ways and to different extents. These new charging powers aim to make charging more consistent across the current producer responsibility schemes, and future new schemes, where one of the Agencies is the regulator.”

Information on SEPA's current charging powers and arrangements for producer responsibility [can be found on their website](#). In a general sense, SEPA has been taking steps for a number of years to move towards full cost recovery across its regulatory remit ²².

Implications for Scotland

Some **key areas for consideration** in relation to this part of the Bill in terms of Scottish implications could include:

- Whether the Scottish and UK Government share ambitions to implement the EU CEP and to what extent, and what implications that has for how delegated powers may be used on a UK-wide basis;
- How common frameworks could set shared ambitions or minimum standards for future use of delegated powers within this Bill;
- The potential benefits and risks of pursuing specific waste policies at UK-wide level - such as efficiency considerations, capacity, internal market issues and regulatory consistency, versus issues such as potential limitations to Scottish policy ambition;
- How UK-wide EPR schemes may interact with the forthcoming Deposit Return Scheme in Scotland and any measures in the [proposed Circular Economy Bill](#);
- Constitutional implications of taking forward areas of devolved policy through UK-wide regulations with consent mechanisms for Scottish Ministers.

There is a history of collaboration between the UK and Scottish Governments on some aspects of waste management. At the same time, the Scottish Government has pursued its own waste policies including its own recycling and waste reduction targets.

The Scottish Government-commissioned report, '[Environmental Governance in Scotland on the UK's withdrawal from the EU Assessment and options for consideration: A report by the Roundtable on Environment and Climate Change](#)' highlighted that Scotland has an ambitious circular economy policy agenda, and noted the potential for interactions between devolved waste policy and **reserved trade arrangements**, for example that new global trade agreements may impact on areas such as product standards.

In [evidence to the Public Bill Committee on the Bill on 12 March 2020](#), Scottish Environment LINK highlighted benefits of UK regulatory consistency to avoid 'regulatory tourism' given the mobility of waste.

Interactions between EPR and the forthcoming Deposit Return Scheme

The Scottish Government consulted on introducing a DRS for drinks containers in Scotland in 2018. The [Deposit and Return Scheme for Scotland Regulations 2020](#) were [approved by the Scottish Parliament in April 2020](#), and under the Regulations the scheme will go live in 2022.

The interaction of DRS with EPR was raised by stakeholders during the ECCLR Committee's scrutiny of the Draft Regulations, with industry keen that DRS in Scotland be well integrated with EPR across the UK, as well as with other waste measures such as ecodesign requirements for products.

The role of Common Frameworks

As discussed in the [section on common frameworks](#), the UK Government's frameworks analysis specified **waste management** and **waste packaging and product regulations** as areas where common frameworks may be needed.

The Brexit & Environment report, '[Environmental policy in a devolved United Kingdom Challenges and opportunities after Brexit](#)' highlights the potentially important role of common frameworks in areas such as waste regulation to prevent a 'race to the bottom' (i.e. Governments competitively lowering standards), but also raises risks of unequal influence across the four nations:

“ If the UK and its devolved governments are able to agree a unified position, their combined strength vis-à-vis businesses and potential polluters will make it easier to adopt ambitious standards across all four nations. However, if standards across the UK differ significantly, polluters may ‘dump’ (literally, in the case of solid waste) in the nation that has the least stringent regulations. There are therefore practical commercial advantages to having single standards across the UK to avoid pollution tourism. However, the greater size of the English economy and the greater familiarity with it in Whitehall may lead to decisions that fail to take account of the diverse needs of the different nations of the UK. The devolved administrations may be reluctant to develop policies that differ significantly in ambition from those in England, especially if those policies are perceived to impose additional burdens on local industry. ”

Part 4: Air Quality and Environmental Recall

Part 4 of the Bill deals with **air quality** and amends the requirements and management of Local Air Quality Management Frameworks.

Air quality is a devolved issue and most of this part of the Bill applies to England only. It also includes a UK-wide provision to require the **recall of motor vehicles** on environmental grounds.

This part of the Bill does not confer any additional powers on Scottish Ministers.

Clause 69: local air quality management framework

Clause 69 and Schedule 11 apply 'in part' in Scotland and an LCM is being sought.

Clause 69 introduces Schedule 11 of the Bill which amends Part 4 of the Environment Act 1995. Most of Schedule 11 does not apply to Scotland. The only aspect of significance to Scotland is a new requirement for the **UK national air quality strategy** to be reviewed within one year of the provision coming into force, then at least every 5 years thereafter (Schedule 11 paragraph 1).

Schedule 11 also amends the Local Air Quality Management (LAQM) Framework to clarify duties and enable greater cooperation between different levels of local government, and other relevant public bodies, in the preparation of Local Air Quality Action Plans. Provisions apply to English local authorities only, and do not change the position for Scottish local authorities.

In the [Legislative Consent Memorandum](#), the Scottish Government sets out that it is content that the approach to air quality in the Bill respects devolved competence, and that a joint UK strategy is appropriate to be maintained "to take account of certain reserved matters that are relevant to air quality, such as vehicle and fuel standards, and also to address transboundary air quality issues".

Background

Air quality is a devolved area but aspects of local air quality management precede devolution and are set out in [Part IV of the Environment Act 1995](#). This requires the UK Government to publish a national air quality strategy and establishes the system of LAQM.

The [UK Government's Clean Air Strategy published in 2019](#) recognises that air quality is a devolved area but highlights the importance of working with devolved governments given the transboundary nature of air pollution, even though most measures in the strategy relate only to England.

In November 2015, the Scottish Government published [Cleaner Air for Scotland – The Road to a Healthier Future \(CAFS\)](#), Scotland's first separate air quality strategy. CAFS sets out in detail how Scotland intends to deliver further air quality improvements over the coming years.

Clauses 71-74: environmental recall of motor vehicles

Clauses 71-74 of the Bill on environmental recall of motor vehicles extend and apply to Scotland and an LCM is not being sought in respect of them.

Product standards, safety and liability are reserved matters (with some exceptions) under Section C8 of [Schedule 5 of the Scotland Act 1998](#) (as amended).

These clauses enable the UK Secretary of State to make Regulation to compel manufacturers of vehicles, vehicle components and Non- Road Mobile Machinery to recall products for reasons of failing to meet an environmental standard.

The [explanatory notes to the Bill](#) state that in 2015, the UK Government became aware that vehicles on the road in the UK were emitting more NO_x (a controlled pollutant) than emission test results would suggest. This was a result of software fitted to the vehicles. The UK Government said that the situation highlighted the limits of its powers to compel recall of vehicles or engines for reasons of environmental non-conformity, in contrast to, for example, powers to compel a recall of any product on the basis of safety.

Implications for Scotland

The implications of this part of the Bill for Scotland are limited and mainly relate to transboundary cooperation via the UK national air quality strategy - in addition to any impacts of application of the reserved power over vehicle recalls. As noted above, Scotland now produces its own air quality strategy and the UK strategy mainly relates to measures in England but can also cover some reserved areas and transboundary issues.

The [Scottish Government stated in 2016 that](#) the total annual cost of air pollution to the UK's economy may be £54 billion, and in Scotland in 2010 fine particulate matter was associated with around 2,000 premature deaths.

An [independent review of the Cleaner Air for Scotland Strategy](#) was published in August 2019. The review found that the LAQM system in Scotland has the potential to "drive further significant improvement". Although the changes made to the LAQM system in the Bill apply in England only, there may be questions around whether the Scottish Government are considering reforms in Scotland as a result of its own review.

In relation to post EU exit standards, in the same way as for waste policy discussed above, EU law on air quality has provided a regulatory baseline above which Governments have pursued different approaches and in some areas cooperated. There is therefore a potential question of how, in the absence of that EU framework, the UK-wide air quality strategy will be used in future and how this relates to any common framework on air quality. As discussed in the [introductory section on common frameworks](#), air quality is an area identified in the UK Government's frameworks analysis as an area requiring a common framework.

While there may be lower potential for 'regulatory tourism' compared to the waste industry given lower relative mobility of the environmental risk, there could still be negative 'race to

the bottom' implications of significantly different air quality standards within the UK - for example if industrial emissions are regulated differently across borders.

It is also worth noting in relation to air quality that UK countries have had challenges with meeting EU targets. The European Commission referred the UK to the CJEU for failure to meet air quality limit values in 2018, including for failure to meet nitrogen dioxide (NO₂) limits. It also took steps against the UK related to failures to implement EU vehicle type approval rules²³. UK NGOs have also used EU law on air quality extensively. The UK Government [has been taken to court three times by Client Earth](#) regarding failures to meet requirements of the EU Ambient Air Quality Directive.

In relation to air quality, the Brexit & Environment report [Environmental policy in a devolved United Kingdom Challenges and opportunities after Brexit](#) notes that within the UK, Scotland has "taken a leadership position" by becoming the first country in Europe in 2016 to adopt World Health Organisation guideline values for PM 2.5, a form of fine particulate matter that causes negative health impacts. The report states that the case of air quality "demonstrates the scope for divergence in performance even when there are common rules, and the importance of access to legal redress to hold governments to account".

Part 5: Water

Part 5 of the Bill covers water quality; water resources; drainage; and the regulation of water and sewerage companies.

Water quality is a devolved issue and most of this part of the Bill applies to England only or England and Wales. A small number of provisions (clauses 81, 84 and 85) apply to Scotland because they relate to cross-border management of water resources.

Clause 81 (water quality: powers of Secretary of State)

Clause 81 applies in Scotland and an LCM is being sought in respect of it.

It empowers the UK Secretary of State to, by regulations, amend specified legislation for the purpose of (a) making provision about the substances to be taken into account in assessing the chemical status of surface water or groundwater; or (b) specifying standards in relation to those substances. Regulations under this Clause would be made under the **negative procedure**.

Specified legislation includes the [Water Environment \(Water Framework Directive\) \(Solway Tweed River Basin District\) Regulations 2004](#) which cover the Solway Tweed river basin district, a cross-border area straddling Scotland and England. Other specified legislation does not relate to Scotlandⁱⁱⁱ.

Clause 81(5) states that regulations under this section may not contain provision applying to that part of a cross-border river basin district which is in Scotland, **unless Scottish Ministers consent**.

Clause 81(6) states that before making regulations the Secretary of State must consult Scottish Ministers where the regulations apply to the part of a Scottish-English cross-border river basin district that is within England, as well as any persons or bodies appearing by the Secretary of State to represent the interests of those likely to be affected.

Water quality in the UK is currently assessed against a framework of EU standards. Standards are set out in domestic water quality legislation that implements [EU Directive 2000/60/EC](#) - known as the Water Framework Directive (WFD) - and any retained law modifying that legislation.

The [UK Government's policy statement in support of the Bill](#) states that these measures will ensure regulations protecting water quality do not become 'frozen' due to EU exit and "keep pace with scientific and technical knowledge after EU Exit".

iii Other specified legislation includes the rules governing the [Northumbria River Basin District](#) (RBD), a very small part of which is in Scotland, but it has no surface water bodies in Scotland and the groundwater underlying the Scottish part of the Northumbria RBD is allocated to the Solway Tweed RBD.

Clause 84: Solway Tweed river basin district: power to transfer functions

Clause 84 applies in Scotland and an LCM is being sought in respect of it.

Clause 84 creates a power for the UK Secretary of State to make Regulations amending the governance arrangements in the Solway Tweed River Basin District (RBD). Specifically it confers a power to amend [the Water Environment \(Water Framework Directive\) \(Solway Tweed River Basin District\) Regulations 2004](#) (the '2004 Regulations') to allow changes to the exercise of functions in the Solway Tweed RBD.

This concerns the functions in the 2004 Regulations of the Scottish Ministers, Secretary of State, SEPA and the Environment Agency. At present, these functions are generally conferred jointly on the Scottish and UK Ministers, and on the Environment Agency and SEPA. The new power allows the Secretary of State to change whether the functions are exercised jointly (requiring the agreement of both the Secretary of State and Scottish Ministers), concurrently (exercisable by either the Secretary of State or Scottish Ministers), or solely by one or the other.

Subsection (7) requires the **consent of the Scottish Ministers** for any regulations under this clause.

The [UK Government's policy statement on the Bill](#) states that the changes "will bring greater efficiency for Scottish and English environment agencies and better reflect devolved competence". The [explanatory notes to the Bill](#)⁹ state that this would enable changes to functions that are currently joint between the UK Secretary of State and Scottish Ministers for the whole of the river basin district. For example, functions could be amended so that in future they are exercised by the Secretary of State alone in relation to the English part, and the Scottish Ministers alone in the Scottish part of the river basin district. Functions of the Environment Agency and SEPA could also be changed in a similar way.

Regulations made under this clause are subject to the **negative procedure**.

The [Legislative Consent Memorandum](#) states that the Scottish Government requested that this provision be included "to allow us to act separately for issues which relate specifically to Scotland in future".

Background - river basin management plans in Scotland

River basin management plans in Scotland set out the state of the water environment, pressures affecting it and a range of actions to address issues. They are produced every six years by SEPA on behalf of Scottish Government.

The Solway Tweed RBD is a [significant area within Scotland](#), covering the whole of Dumfries & Galloway and the Scottish Borders. Approximately 70% of the RBD is in Scotland.

The [current Solway Tweed river basin management plan](#) sets out how the Scottish and UK Governments work together in this area. The Environment Agency and SEPA are jointly responsible for producing and implementing the plan on behalf of the UK and Scottish

Governments. The plan states that partnership working at a catchment level is vital to the delivery of its objectives.

SEPA is currently leading on the review and update of the plan for the Solway Tweed river basin district, including the geographic area within England, and is [consulting on 'The challenges facing our water environment in the Solway Tweed'](#) (closing in June 2020). The district includes the Border Esk, Tweed and Solway Estuary catchments.

In 2014, 54% of the Solway Tweed river basin district's water bodies and 64% of these protected areas were assessed as being in a good or better condition²⁴. Information about the condition of water bodies in Scotland can be found on [SEPA's water environment hub](#)

Clause 85: water quality: interpretation

Clause 85 (water quality: interpretation) applies to Scotland, Wales and Northern Ireland and an LCM is being sought in respect of it.

This clause provides a number of definitions for terms used in preceding clauses on the water environment.

Implications for Scotland

As set out above, water quality is a devolved issue and the Bill therefore does not appear to impact on Scotland's ability to pursue a largely autonomous water policy (with the exception of the Solway Tweed river basin district).

Regarding **common frameworks**, water quality is an area where the [UK Government's 2019 Frameworks Analysis](#) set out that no further action to create a common framework was considered to be required. This reflects the current decentralised nature of water regulation under EU law²⁵.

Regarding the powers created to amend the current joint governance of the Solway Tweed river basin in **clause 84** - the supporting documents for the Bill do not contain information on the need for this change e.g. what the drawbacks are to current arrangements or what the drivers for change are, and how cross-border partnership would be maintained under any future arrangements.

Scottish Environment LINK stressed the importance of cross-border collaboration on river basin management [in evidence to the Public Bill Committee on 12 March 2020](#), encouraging the continuation of cross-border arrangements for cross-border types of environment.

Water quality in a cross-border river basin district can be seen as a special area justifying uniquely flexible arrangements. However, this power is an example of a new way being created to re-draw the boundary between the competences of UK Ministers and Scottish Ministers without following the formal procedures that were established at the time of devolution, and without scrutiny of the legislation by the Scottish Parliament.

To alter the existing division of competences through the powers for doing so in Scotland Act 1998 (under which UK Ministers' functions in devolved areas were generally transferred to the Scottish Ministers) would normally require a higher degree of parliamentary scrutiny than will be required under this clause. It would generally be subject to the scrutiny of the Scottish Parliament. For example, a "transfer of functions" order requires to be laid in, and approved under the affirmative procedure by, both the UK and Scottish Parliaments (s. 63 of the Scotland Act 1998).

To make "agency arrangements" for a function of the UK Ministers to be exercised on their behalf by the Scottish Ministers, or vice versa, requires subordinate legislation that is laid in both the Scottish and UK Parliaments and can be annulled by either Parliament (s. 93 of the Scotland Act 1998).

This clause, however, allows functions in a devolved area to be reallocated between the Scottish and UK Ministers by subordinate legislation which is subject to the negative procedure and laid in the UK Parliament alone. While the Scottish Ministers' consent is required, the Scottish Parliament's consent is not. There would be no formal means for the proposals for the new division of functions to be scrutinised by the Scottish Parliament.

Clause 81 relates principally to how the UK Government will amend technical water quality standards post EU exit. This could raise a broader question for the Scottish Parliament of how the Scottish Government intends to approach amendment of EU-derived technical standards in future. For example, this may be sought to be achieved through a general 'keeping pace' power in the forthcoming Continuity Bill.

The [report on environmental governance in Scotland by the Roundtable on Environment and Climate Change](#) highlighted that although implementation of EU water legislation is largely de-centralised, the many technical specifications sitting under the WFD are developed through EU-level expert and stakeholder driven processes. This link with EU process will be lost after the UK's withdrawal, raising the question of how, in practice, bespoke, subject-specific environmental governance will be developed in the UK. This is one of many detailed areas of environmental governance likely to require a long-term approach post EU exit.

PART 8 Miscellaneous and General Provisions

Part 8 (Miscellaneous and General Provisions) of the Bill includes provision to:

- amend two pieces of legislation relating to the regulation of chemicals.
- allow for consequential provision; regulations; commencement and transitional or saving provision; and
- set out the position in relation to Crown application; financial provisions; and the extent and the short title of the Bill, which may be cited as the Environment Act 2019.

Clause 125: amendment of REACH (chemicals regulation)

Clause 125 and Schedule 19 on the regulation of chemicals extend and apply to Scotland and an LCM is being sought in respect of them.

Clause 125 gives effect to Schedule 19, which gives the Secretary of State the power to amend the REACH Regulation and gives both the Secretary of State and Scottish Ministers power to amend [the REACH Enforcement Regulations 2008](#).

The REACH Regulation refers to the EU regulation on chemicals: the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation, which will become retained EU law at the end of the transition period (31 December 2020). The retained EU law version of the REACH Regulation will apply in the UK as amended by the [REACH etc. \(Amendment etc.\) \(EU Exit\) Regulations 2019](#). The REACH Enforcement Regulations 2008 set out how the requirements of the REACH Regulation are enforced.

Paragraph 1 of Schedule 19 provides the Secretary of State with a power to make regulations to amend the REACH Regulation, provided that they consider they are consistent with Article 1 of REACH, which sets out the aim and purpose of the system.

The power of the Secretary of State to make regulations under this Schedule is subject to the **consent requirement of devolved administrations - Scottish Ministers in Scotland** - in Article 4A of the REACH Regulation. Schedule 19 also requires the Secretary of State to consider any request made by Scottish Ministers for the Secretary of State to make regulations under this Schedule.

Regulations under Schedule 19 Clause 1 must be made using the **affirmative procedure**.

The Bill also gives devolved administrations concurrent powers to amend [the REACH Enforcement regulations](#). Amendments can be made to create, or widen the scope of, a criminal offence or to specify the punishment for a criminal offence in respect of enforcement of the REACH Regulation. Offences under any Scottish regulations cannot be punishable above specified maximum limits.

In introducing the Bill, [former Secretary of State for Environment, Food and Rural Affairs, Theresa Villiers MP](#) said in relation to provisions on chemicals:

“ This will allow the Secretary of State to take further steps where necessary to ensure a smooth transition to a UK chemicals regime following the UK’s exit from the EU. It will also make it possible to keep the legislation up to date and respond to emerging needs or ambitions for the effective management of chemicals.”

Protected provisions of the REACH Regulation

Schedule 19 clause 1(3) sets out that the Secretary of State may not make regulations using the powers in the Bill to amend any 'protected provision' of the REACH Regulation. Protected provisions include:

- Provisions categorised as 'fundamental principles' of REACH including Article 1 (aim and scope of REACH), Article 5 (the principle of “no data, no market”), Article 25(1) (animal testing as a last resort) and Article 35 (access to information for workers);
- Provisions setting out **the role of the devolved administrations** (namely the requirement in article 4A to obtain the consent of the devolved administrations to the extent that the exercise of the function is within devolved competence; and the “safeguard clause” in article 129);
- Provisions on 'transparency' including publication of information on evaluation;
- Provisions on 'collaboration between the Agency and other bodies' including provisions on conflicts of opinion with other bodies and contacts with stakeholders;
- The Annexes.

The [Legislative Consent Memorandum](#) sets out the Scottish Government's view that "short of retaining full participation in the European Chemical Agency and associated EU regulations, chemicals regulation in the UK is best delivered on a UK wide basis".

Background: REACH, chemicals and EU exit

The regulation of chemicals in the EU is highly centralised, regulated principally by [Regulation \(EC\) No 1907/2006](#) concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (the REACH Regulation). EU REACH is a regime for protecting human health and the environment from the use of chemicals, and enabling free movement of chemicals in the EU. The European Chemicals Agency (ECHA) is the lead implementation body.

EU Member States and three countries in the European Economic Area (Norway, Iceland and Liechtenstein) participate in REACH. Switzerland and Turkey have legislation mirroring REACH and the ECHA has “cooperation agreements” with Australia, Canada, Japan and the USA, which focus on information exchange. REACH is generally viewed as becoming an international standard of chemical regulation^{26 27}.

If no action was taken to replace REACH upon leaving the EU, all chemical registrations would become invalid in the UK. In preparation for a potential no deal EU exit, the UK Parliament passed the [REACH etc. \(Amendment etc.\) \(EU Exit\) Regulations 2019](#). At the end of transition period, the REACH Regulation will become “retained EU law” in the UK, as amended by the 2019 Regulations. During the transition period, EU REACH continues to apply.

The retained law version of the REACH Regulation will create a new system of chemicals regulation in the UK, 'UK REACH'. The new regime seeks to largely replicate EU REACH although it does not contain any keeping pace provisions. The 2019 Regulations were described [by the Scottish Government](#) in 2018 as “one of the most substantial pieces of legislation needed to address the consequences of Brexit”.

Under the new regime, decision-making powers currently held by the ECHA transfer to the UK Secretary of State, who will require the consent of the devolved administrations before taking any decision which interacts with devolved competence. These include decisions on restrictions and granting of chemicals authorisations. More technical decisions which are currently taken by the ECHA will pass to the Health and Safety Executive (HSE), taking advice from SEPA on environmental issues in respect of Scotland.

Devolved administrations are also able to take action on a provisional basis to restrict a chemical if they consider urgent action is essential to protect human health and the environment. In Scotland, Scottish Ministers may also take action by regulations to restrict a chemical substance under section 140 of the Environmental Protection Act 1990 - used in 2018 for example [to ban microbeads](#).

Scottish Parliament consent to UK-wide chemicals regulation being made at Westminster

The Scottish Government, whilst accepting the need for a UK-wide approach and need to establish a UK REACH in case of no deal, [has maintained its position to date](#) that it would prefer the UK as a whole to continue to be a member of EU REACH post EU exit.

[In notifying the Scottish Parliament of its intention to consent to the REACH \(Amendment\) \(EU Exit\) Regulations 2019](#), the Scottish Government set out that it considers there is continuing value in maintaining a consistent approach within the UK following EU Exit, and that devolution is "respected in the new UK REACH regime". The Scottish Government also highlighted that chemicals policy engages a complex mixture of reserved and devolved competence. While environmental protection and public health are devolved, product safety and liability, animal testing and health and safety at work are reserved.

[The ECCLR Committee](#) considered the Scottish Government's intention to consent to the 2019 Regulations being made at Westminster, and agreed to this in December 2018. These Regulations were amended a further two times as part of the deficiency-correcting process ([The REACH etc. \(Amendment etc.\) \(EU Exit\) \(No. 2\) Regulations 2019](#) and [The REACH etc. \(Amendment etc.\) \(EU Exit\) \(No. 3\) Regulations 2019](#)). Although the ECCLR Committee consented to the broad outline of these Regulations, it raised concerns with the Scottish Government that governance mechanisms that currently support the functioning of EU REACH were not being replicated in UK REACH from the outset.

At EU-level, committees and expert working groups enable NGOs, health bodies and other stakeholders to feed in to decision making. Whilst these structures were not replicated in UK REACH, the Scottish Government [told the ECCLR Committee](#) that a pool of scientific experts will be put in place to perform the same function as the EU expert committees.

Stakeholder reactions

CHEM Trust, a UK charity and an accredited stakeholder of the ECHA, said [in evidence to the Public Bill Committee on the Bill on 12 March 2020](#) that consultation on post EU exit

chemicals regulation has been limited, there was no consultation on the protected articles, and no rationale provided as to why those are protected and others are not. They said that EU processes on chemicals are "a lot more open and consultative".

Specifically, CHEM Trust suggested that two further articles of the REACH Regulation should be added to the list of protected provisions: Article 33 on consumers' right to know about the most hazardous chemicals in the product, and Article 34 which is an obligation to report problems with chemicals further up the supply chain.

More broadly, Unite and CHEM Trust both highlighted how complex chemicals regulation is, regulating tens of thousands of chemicals, raising concerns about the capacity of authorities in the UK to replicate REACH. CHEM Trust previously called for the UK Government to accept the need to continue to align with EU chemical laws, stating that any divergence will rule out EU REACH membership, with negative impacts for industry:

“ The timeline is short, with a real risk of an exit with no trade deal at the end of 2020, which would be similar to a no-deal exit for England, Wales and Scotland, though Northern Ireland will remain in REACH. We need the new government to ensure this doesn't happen, even if this means asking the EU for a further extension to the transition period before the end of June 2020. ”

In the same session, the Chemical Industries Association said that it considers the measures in the Environment Bill to be appropriate, primarily because Article 1 in the REACH Regulation (its aim and scope) is protected. They also said that although there may be some opportunities associated with a UK system, for example to identify national priorities, "the need to stay close to the European chemicals regulations far outweighs the opportunities".

CHEM Trust also raised issues with capacity of UK bodies to enforce existing chemicals regulations:

“ We talk a lot about the risk-based approach in the UK regulations, but we did a survey a couple of years ago of how councils were enforcing the laws on the safety of consumers—toys with illegal levels of phthalate chemicals, for example—and we found that large numbers of councils do no testing at all, and that even the ones that do some testing do not do much. Yet, when they do testing, they find lots of failure. We know that banned chemicals are on our high streets and in our markets, now. That really does not give us confidence that somehow there will be this amazing leap in UK capacity to implement and enforce these laws.”

Implications for Scotland (chemicals)

As discussed above, the Scottish Parliament has already agreed to the broad outline of the post EU exit chemicals regulation being taken forward on a UK-wide basis via an amended version of retained EU law. However, these Regulations were passed in the context of preparations for a 'no deal' exit, with the understanding that they may need to be reviewed as the basis of a longer term arrangement. As is usual when considering notifications, the proposed text of the legislation was not available to the Scottish Parliament when considering the matter.

Key questions may be around whether the Scottish Parliament is satisfied with UK Government taking powers to amend the REACH Regulation in future, subject to protected

provisions and a consent mechanism for Scottish Ministers. The Bill is likely to also raise broader questions including:

- Whether there is still scope for the UK to remain a member (or some form of associate member) of EU REACH post-EU exit and what the Scottish Government's position is on this;
- Should UK REACH go ahead, to what extent UK REACH can and will keep pace with EU REACH, and what the implications of regulatory divergence could be in Scotland;
- How common frameworks may be used to set UK-wide ambitions on chemicals policy;
- To what extent effective scrutiny can be carried out of decisions on common frameworks made between the Scottish Ministers and UK Ministers, particularly in relation to frameworks which will not be set down in legislation;
- To what extent is there scope for any divergence of approach in Scotland;
- What are the implications of devolved aspects of chemicals regulation being decided by UK Ministers, with the consent of Scottish Ministers, potentially without the Scottish Parliament being able to scrutinise the detail of proposed legislation.

Potential divergence between UK and EU REACH

The [report on environmental governance in Scotland by the Roundtable on Environment and Climate Change](#) said that a UK-wide approach to chemicals regulation would be desirable, as all of UK industry will need to continue to comply with EU rules in order to sell in the EU market, and Scotland relies on UK-wide chemicals expertise ²⁵. However the report also says that the UK has traditionally argued for a balanced approach to risk in chemicals regulation, and notes that Scotland “does not necessarily align with Westminster’s approach to risk.” The report also raised concerns about losing UK influence on international chemicals regulation.

In [evidence to the ECCLR Committee on 11th December 2018](#), CHEMTrust and Chemical Sciences Scotland raised concerns about future regulatory divergence from EU REACH, in particular as time goes on. Concerns were also raised about the potential for pressure to adopt weaker controls in **future trade deals**. Chemical Sciences Scotland suggested the potential for divergence posed difficulties to the sector in Scotland in particular for imports and exports, where there is lots of interchange between Scotland and the EU.

There was a [debate on regulatory divergence and chemicals](#) in the UK Parliament on 26th February 2020. The UK Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs, Victoria Prentis MP said that leaving the EU provides “a unique opportunity” to develop a regulatory environment that will deliver high standards, but “be flexible according to our current and future needs”. She also said:

“ The building blocks of REACH will all remain. Through the Environment Bill, we will make provision to allow us to amend REACH in future to ensure that our chemicals management remains fully up to date. All change will remain consistent with the fundamental aims and principles enshrined in EU REACH. There will also be a series of protected provisions that cannot be changed, such as the last resort principle on animal testing, which will be included in the Environment Bill, as has been said. The UK will, of course, continue to be at the forefront of opposing animal tests where alternative approaches can be used. We have led the way on that in the EU system to date. I recognise the concerns that several hon. Members have raised during the debate about the UK diverging from the approach taken in the EU to the regulation of chemicals, which are obviously shared by all our stakeholders. We will not diverge for the sake of it. If we diverge, it will be done in the best interests of the UK and the environment, and of course we will take account of the impact on industry. What matters is that the decisions we take will be our own, reflecting our new autonomy. Robust scientific evidence lies at the heart of the decisions we take, and that will continue, as provided for in the UK REACH legislation. ”

Law firm [Burgess Salmon](#) have commented that, given the shift in the UK Government's position on regulatory alignment, the implementation of UK REACH "now looks highly likely", and speculated that the **outcome of the trade negotiations** could result in further, and possibly 'fundamental' changes to the REACH Regulation before December 2020.

Common Frameworks on chemicals

The Scottish Government [updated the ECCLR Committee on 24 October 2019](#) that work on a chemicals and pesticides common framework was progressing and would shortly move into 'phase three' involving consultation and development of a provisional framework. The Cabinet Secretary for the Environment, Climate Change and Land Reform, Roseanna Cunningham MSP further updated the ECCLR Committee on UK discussions on chemicals regulation in [evidence on 29 October 2019](#):

“ This is about maintaining the highest possible standards and protections for public health and the environment and, crucially, for business, to make sure that it has consistency and continuity. Chemicals are one of those things that most people do not really think about, but they underpin an enormous amount of our industry and they are incredibly important for the functioning of our economy. I intend to make a case for the UK retaining membership of the European Chemicals Agency—I have a strong view about that—and participating in all the relevant regulatory regimes. ”

Conclusions - Implications of the Bill for Scotland

Given the provisions that apply in Scotland are mainly delegated powers to introduce or amend Regulations, for example on producer responsibility and chemicals regulation, the precise implications for the Scottish environment, and for devolved competence, are at present difficult to determine.

Professor Colin Reid, professor of environmental law at the University of Dundee emphasised this 'framework' quality of the previous UK Environment Bill in 2019 ²⁸ :

“ There are some clear innovations in the Environment Bill, but it will take a lot of effort and a lot of poring over existing detailed legislation to unpick just how far the new Bill will change the existing law, which parts of the UK each provision will apply to (and hence the Bill’s interaction with devolved powers) and whether it will mean a tightening or a weakening of controls. In many cases the answer to that question will lie not in the Bill itself but in what comes afterwards. That is not inappropriate given how rarely there is an opportunity for primary legislation to reset the regulatory framework, but means that debates on the Bill may well get caught up in arguments over how far future governments should be constrained in their choices and the balance between reducing regulatory burdens on industry and securing the future of the planet.”

As discussed earlier in the briefing in relation to specific policy areas, EU membership to date has created a 'common floor' whilst allowing for a range of approaches in devolved areas. The **introduction of 'shared powers' in a number of areas in the Bill raises policy, legal and constitutional questions about how this approach will work** in the post-EU exit environment. This includes questions about how UK-wide environmental objectives or a common floor will be agreed between administrations e.g. through common frameworks, and to what extent the Scottish Parliament will be able to scrutinise subordinate legislation which covers devolved areas but is made in the UK Parliament.

In general, the areas that are anticipated to be taken forward at UK-wide level through this Bill, are areas where there is a **history and background of collaboration** between the UK and devolved Governments - for example due to UK internal market considerations.

Scottish Environment LINK said [in evidence to the Public Bill Committee on 12 March 2020](#) that the biggest environmental risk in relation to UK-wide approaches to environmental regulation is a 'race to the bottom', therefore what is put in place instead needs to instead encourage a 'race to the top'. In terms of aspects of the Bill that are UK-wide, LINK said:

“ ...the Scottish Government have opted in to some and not other parts of the Bill. I think that is fine. It is very welcome that they are moving faster on a deposit return scheme. On the other hand, it looks as though there is agreement on extended producer responsibility, and all Administrations will move together. I hope that the race to the top will encourage all Administrations to move faster... In relation to England, the Bill does some very positive things regarding biodiversity and the recovery of nature, and the setting of targets. I would argue that the Scottish Government could learn from that and then go beyond it.”

The Scottish and UK Governments, as they did previously, have separate and distinct environmental strategies and targets - notably for example different climate targets, and in some cases different environmental challenges. Common Frameworks may be able to address, to some extent, the gaps arising from EU exit by providing new, negotiated, shared goals or minimum standards, within which UK-wide policies or schemes such as chemicals regulation and producer responsibility can operate.

Issues may arise where there is not agreement on strategic environmental targets, or due to varying commitments to keeping pace or to non-regression. As set out in the context to the briefing, the Scottish Government has a strategic ambition to keep pace with EU law whereas the UK Government does not.

Issues could also arise where outcomes of trade agreements - the negotiation and conclusion of which are a reserved area - impact on devolved environmental regulation. Where common approaches are agreed to facilitate the functioning of UK internal markets, given the relative size of markets, any rules or policies made for England could have a significant influence on Scotland in terms of how industry operates or on the goods and services available. Some of these issues are only beginning to be explored in detail.

In some areas, such as chemicals regulation, the centralised nature of regulation at EU level could also mean there is, at least at present, less capacity within the Scottish Government and agencies (and beyond that, potentially also in academia and the third sector) to pursue their own policy aims.

In relation to provisions on environmental governance and principles in the Bill, there are significant questions to be explored about the remit of the OEP in Scotland in reserved areas, how different governance arrangements across the UK will interact, and how potentially different sets or interpretations of environmental principles will interact.

Many of these are long-term questions about the future of environmental law, and implications for devolved competence, triggered by aspects of the Bill and by EU exit, which are unlikely to be answered fully within the course of the Bill's passage.

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