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Environment, Climate Change and Land Reform Committee

**Comataidh Atharrachadh Clìomaid is Ath-leasachaidh
Fearann**

The Environment (EU Exit) (Scotland) (Amendment etc.) (No. 2) Regulations 2019 [draft]



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Environment, Climate Change and Land Reform Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Environment, Climate Change and Land Reform.



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Background and parliamentary procedure

1. [The Environment \(EU Exit\) \(Scotland\) \(Amendment etc.\) \(No. 2\) Regulations 2019 \[draft\]](#) were laid before the Scottish Parliament on 8 November 2019 and referred to the Environment, Climate Change and Land Reform Committee. The Committee must report on the Regulations by 14 January 2020.
2. The Regulations are made under Schedule 2 of the European Union (Withdrawal) Act 2018. Scottish Ministers have discretion about whether instruments made under Schedule 2 of the 2018 Act should be subject to the affirmative or negative procedure, unless the instrument makes provision falling within one of the categories which requires the mandatory affirmative procedure to be used. This instrument falls within one of these categories and is required to follow the affirmative procedure. The affirmative parliamentary procedure is set out in Chapter 10 of Standing Orders.
3. A protocol has been agreed between the Scottish Government and Scottish Parliament on the process for considering SSIs laid under the 2018 Act. The protocol sets out an approach which categorises SSIs – high, medium or low – to assist committees’ prioritisation in terms of scrutiny and gives the Delegated Powers and Law Reform Committee (DPLRC) a role in highlighting to a lead committee those SSIs where it disagrees with the Scottish Government about the categorisation.

The Environment (EU Exit) (Scotland) (Amendment etc.) (No. 2) Regulations 2019 [draft]

4. These Regulations make amendments to legislation relating to waste and the protection of the environment to address failures of retained EU law in order to operate effectively. Specifically, the Regulations would amend the Landfill Allowances Scheme (Scotland) Regulations 2005; the National Waste Management Plan for Scotland Regulations 2007; the Waste Batteries (Scotland) Regulations 2009; the Waste Management Licensing (Scotland) Regulations 2011; and the Regulatory Reform (Scotland) Act 2014.
5. The most significant change is to the wide power in s18(1) and Schedule 2 paragraph 22 of the Regulatory Reform (Scotland) Act 2014. This power currently enables the Scottish Ministers, by regulations, to make provision which corresponds or is similar to any provision made under s2(2) of the European Communities Act 1972 in connection with an EU obligation relating to protecting and improving the environment.
6. The draft instrument would amend this power by providing instead that, post-exit, Scottish Ministers may make any provision by an Act of the Scottish Parliament in connection with a specified list of EU instruments. The list is contained in [regulation 2\(3\)\(b\)](#) of the draft instrument and consists of 21 EU Directives and four EU Regulations.
7. During evidence, the Cabinet Secretary confirmed that—
 - ” To put it simply, the Government needs to be able to continue to implement aspects of EU law that are passed before exit day, such as the latest changes to the waste framework directive, but which have not yet been transposed into domestic law on the date of exit.
8. When asked about why the wide power in the Regulatory Reform (Scotland) Act 2014 was being replaced with a closed list, an official clarified that the list comprises the items identified which either require future implementation or might require change. These have only been identified in relation to the 21 EU Directives and four EU Regulations.

Consideration by the Delegated Powers and Law Reform Committee

9. The Scottish Government gave the SSI the 'medium' categorisation. The protocol agreed between the Scottish Government and Scottish Parliament states that instruments which fall in the 'medium' categorisation would be "predominantly concerned with technical detail but which include some more significant provisions that may warrant subject committee scrutiny" or where Ministers have a "limited policy choice but with more significant implications".
10. The DPLRC considered the instrument at its meeting on 19 November 2019 and agreed to recommend it is re-categorised as 'high' as it amends a power to legislate. The protocol states that instruments which fall in the 'high' categorisation would include significant policy implications, transfer/replace/modify EU functions or create or amend a power to legislate.
11. The DPLRC considered the instrument again at its meeting on 26 November 2019 and agreed it had no points to raise with the Committee.

Consideration by the Environment, Climate Change and Land Reform Committee

12. Following her evidence, the Cabinet Secretary moved motion S5M-19962—

That the Environment, Climate Change and Land Reform Committee recommends that the Environment (EU Exit) (Scotland) (Amendment etc.) (No. 2) Regulations 2019 [draft] be approved.

13. The motion was agreed to.

14. The Environment, Climate Change and Land Reform Committee recommends that the Environment (EU Exit) (Scotland) (Amendment etc.) (No. 2) Regulations 2019 [draft] be approved.

