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Environmental Governance in Scotland after EU Exit

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This briefing considers the implications of EU exit for environmental governance in Scotland. It reviews the state of play and outstanding environmental governance issues in preparation for EU exit.



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Contents

Introduction	3
Future alignment with EU environmental standards	5
Continuation/replacement of EU environmental governance arrangements	10
Replacement of the EU's review and enforcement powers over UK authorities	15
The role of EU environmental law principles in future policy making	18
Allocating repatriated governance powers between the UK and devolved administrations after EU exit	21
Key issues for future consideration	23
Bibliography	24

Introduction

EU exit will affect the mechanics of environmental law-making and enforcement in Scotland, as well as in the rest of the UK. Since the 2016 EU referendum, environmental matters have therefore been at the centre of an ongoing flurry of preparatory activities on both sides of the Scotland-England border.

These activities have focused on a set of cross-cutting questions, namely:

- Whether and how to ensure the UK's **future alignment** with EU environmental standards;
- Whether and how to **replace extant environmental governance arrangements** that presently depend on EU institutions – such as emissions trading and chemicals regulation;
- Whether and how to **replace the EU's review and enforcement powers** over public authorities in the UK;
- Whether and how to maintain the **role of EU environmental law principles** in future policy making across the UK;
- How to **allocate law-making and enforcement powers** presently exercised by the EU between UK and devolved administrations after exit.

The solution to these complex questions largely depends on the future relationship between the UK and the EU. At the time of writing, this relationship remains undetermined. While the UK is set to leave the EU on 31 January 2020, its future relationship with the EU remains under negotiation. The possibility of a no deal exit is still on the table, should a future relationship not be agreed by the end of the transition period (at the end of 2020). In this context, [a Scottish Government report released in October 2019](#) notes:

“ A ‘No Deal’ exit would have major implications for the law in devolved areas, since EU law on matters such as agriculture and the environment would no longer apply and devolved legislation that implements or is otherwise linked to EU law may no longer work properly. The Scottish Government has therefore undertaken a large volume of work to identify and find solutions for these issues. That work has identified a need to develop and put in place nearly 50 Scottish Statutory Instruments (SSIs) in time for a ‘No Deal’ exit. Of those, over 40 have already been made or are with the Scottish Parliament for consideration, and the remainder are in hand for 31 October. ¹ ”

The report also notes that “interim environmental governance arrangements would create a mechanism to monitor environmental standards but cannot fully replace the oversight provided by the European institutions.”

For more information on EU exit, see SPICe briefings: [The Revised \(European Union\) Withdrawal Agreement Bill - Implications for Scotland](#), [Developing the Scottish Parliament's Scrutiny Role after Brexit](#) and [Brexit Events Timeline: Scottish Parliament Engagement and Scrutiny](#).

This briefing considers the implications of EU exit for environmental governance in Scotland. It reviews the state of play and outstanding environmental governance issues in preparation for EU exit. The report considers action already taken by the Scottish Government, as well as plans announced in the 2019-2020 Programme for Government. These matters are looked at in light of developments at the UK level including those which have taken place after the general election of December 2019.

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Future alignment with EU environmental standards

The Scottish Government has expressed its ambition to maintain close ties with the EU, and to continue to align with EU environmental standards after exit². In October 2019, a letter from the Cabinet Secretary for Environment, Climate Change and Land Reform (ECCLR), Roseanna Cunningham MSP to the ECCLR Committee stated:

“ The new Continuity Bill will bring back provisions to ensure Scots law may continue to keep pace with EU law, as we believe that the extent to which devolved law aligns itself with the law of the EU should be a decision for this Parliament to take, not the UK Government.”

Whether Scotland will manage to realise this ambition to keep pace with EU law, however, largely depends on the future relationship between the UK and the EU after exit and potentially also on governance arrangements across the UK. At the time of writing, the future relationship between the UK and the EU remains to be determined.

Comparatively more information is available on the likely degree of the UK’s future alignment with EU environmental standards. The [2018 Draft EU Exit Agreement](#) explicitly committed the UK Government to maintain EU environmental standards. In this context the Draft Agreement said (emphasis added):

“ With the aim of ensuring the proper functioning of the single customs territory, the Union and the United Kingdom shall ensure that **the level of environmental protection provided by law, regulations and practices is not reduced below the level provided by the common standards applicable** within the Union and the United Kingdom at the end of the transition period... ”

‘Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as Agreed at Negotiators’ Level on 14 November 2018, 2018³

However, the reference to non-regression of environmental standards in the text above no longer features in the [Withdrawal Agreement reached by the EU and the UK Government in October 2019](#). Instead, the non legally binding Political Declaration accompanying the agreement 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. ”

Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom, 2019⁴

In October 2019, the Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham MSP, [commented before the ECCLR Committee](#):

“ The changing language (...) is a worry for us, because it appears that— perhaps not today, tomorrow or next week, but at some point—there will be an attempt to diverge from the EU standards to which we have become accustomed. The Government and I need to protect our environmental policy from that as much as possible.”

Civil society organisations have similarly raised concerns with the approach set out in the 2019 Withdrawal Agreement and Political Declaration. **Greener UK and Wildlife and Countryside Link** wrote:

“ The loss of the non-regression provision from the Withdrawal Agreement heightens the need for legal certainty. Without it, there is no doubt that environmental law will come under sustained deregulatory pressure, including from those seeking to strike trade deals, for example with the US.”

Greener UK and Wildlife and Countryside Link, 2019⁵

Statements made by the UK Government in combination with the Political Declaration suggest that divergence of environmental standards after Brexit is a possibility. For example, [in a letter to European Council President Donald Tusk of 19 August 2019, Prime Minister, Boris Johnson MP](#) stated:

“ Although we remain committed to world-class environmental, product and labour standards, the laws and regulations to deliver them will potentially diverge from those of the EU. That is the point of our exit and our ability to enable this is central to our future democracy.”

The text of the Withdrawal Agreement was introduced in the UK Parliament in December 2019, in [the European Union \(Withdrawal Agreement\) Bill](#). A [Committee of the Whole House](#) started considering the bill on 7 January 2020. See see SPICe briefing: [The Revised \(European Union\) Withdrawal Agreement Bill - Implications for Scotland](#).

In the meantime, [the Queen’s Speech of December 2019](#) announced the introduction of an Environment Bill (see Box 1).

Box 1: The UK Government's position on environmental governance post EU exit

The [Environment Bill 2019](#) was introduced in the UK Parliament in October 2019 and aimed to address environmental governance gaps following withdrawal from the EU and beyond. The Bill set out to put into legislation a series of environmental principles and to establish an Office for Environmental Protection, endowed with scrutiny, advice and enforcement functions. The Bill also made provision for setting long-term environmental targets in four “priority areas” – air quality, water, biodiversity, and resource efficiency and waste reduction - seeking to place elements of the UK Government's 25 Year Environment Plan on a statutory footing. The Bill primarily concerns England, but some parts of it apply to the whole of the UK or to specific parts of it. The Bill fell in December 2019 with the end of the parliamentary session. More information on the Bill can be found [in the House of Commons Library Bill briefing](#).

Following the general election of December 2019, it is not yet known whether the UK Government will reintroduce the same Bill, or an amended version. The [Queen's Speech of December 2019](#) announced (emphasis added):

“ My Ministers remain committed to protecting and improving the environment for future generations. For the first time, **environmental principles** will be enshrined in law. Measures will be introduced to improve air and water quality, tackle plastic pollution and restore habitats so plants and wildlife can thrive. Legislation will also create **new legally-binding environmental improvement targets**. A new, world-leading **independent regulator** will be established in statute to scrutinise environmental policy and law, investigate complaints and take enforcement action [**Environment Bill**].”

In connection with this proposed Bill, the [2019 Conservative Party manifesto](#) said (emphasis added):

“ **Our Environment Bill will guarantee that we will protect and restore our natural environment after leaving the EU. (...)** We will set up a new independent Office for Environmental Protection and introduce our own legal targets, including for air quality.”

In October 2019, [the Scottish Government indicated](#) that it would not support the Withdrawal Agreement. Its [Programme for Government for 2019-2020](#) specifically provides for the introduction of a Continuity Bill to allow the Scottish Parliament to ‘keep pace’ with EU law in devolved areas (see Box 2).

Box 2: The Scottish Government's position on environmental governance after EU exit

The Scottish Government has laid out its approach to environmental governance after EU exit in a series of documents. Its main strategy document, [Scotland's Place in Europe](#), says (emphasis added):

“ We remain committed to maintaining, protecting and enhancing our environment. (...) Maintaining, protecting and enhancing Scotland's environment will be best achieved through on-going co-operation at the European and International levels, and ensuring that **future trading arrangements recognise the mutual gain to nations and their citizens from requiring high environmental standards.** ”

The [Programme for Government for 2019-2020](#) commits to introducing a **Continuity Bill** to take forward measures to address a set of environmental governance issues associated with EU exit (emphasis added):

“ The Scottish Government has decided to introduce a Continuity Bill to allow the Scottish Parliament to **'keep pace' with EU law in devolved areas** if Brexit occurs. We are also clear that EU exit must not impede our ability to maintain high environmental standards. We will develop proposals **to ensure that we maintain the role of environmental principles and effective and proportionate environmental governance** and any legislative measures required will be taken forward in the Continuity Bill. In the event of 'no deal', we will put in place interim, non- legislative measures while continuing to develop longer-term solutions.”

The Scottish Government also committed to set out its "new overarching approach to environmental protection" through an Environment Strategy - which will be "a living and evolving strategy, able to adapt to new evidence as it emerges and refocus work to take advantage of new opportunities or address new challenges". [Scottish Environment LINK have campaigned for](#) overarching environmental targets to be put on a legislative footing in a new Scottish Environment Act.

So while both the Scottish and the UK Governments have pledged to maintain high levels of environmental protection after EU exit, their approach to future alignment with EU standards significantly differs.

The degree of regulatory alignment between the EU and the UK on matters such as products and environmental standards will depend on the relationship between them after exit. The non-binding Political Declaration provides for the negotiation of a **Free Trade Agreement** between the EU and the UK. There are no 'level playing field' provisions (see Box 3) within the Withdrawal Agreement. The Agreement says that there will be customs and regulatory checks on goods crossing from Great Britain to Northern Ireland, and that EU customs duties will apply to goods entering Northern Ireland from Great Britain or from outside the EU, where there is a risk those goods may subsequently enter the Single Market. See SPICe briefings [The European Union \(Withdrawal Agreement\) Bill - Implications for Scotland](#) and [Anatomy of Modern Free Trade Agreements](#).

Box 3: What is the 'level playing field'?

The Institute for Government [defines the level-playing field](#) as follows:

“ The Single Market operates to a set of common rules and standards, designed to ensure fair competition between members. Some of these are technical, for example specific product standards, but others are designed to make sure that companies operating in different countries operate in a similar enough environment – the so-called 'level playing field'. The European Commission and the European Court of Justice enforce those rules, to prevent member states giving their businesses a competitive advantage by changing – or not enforcing – those rules.”

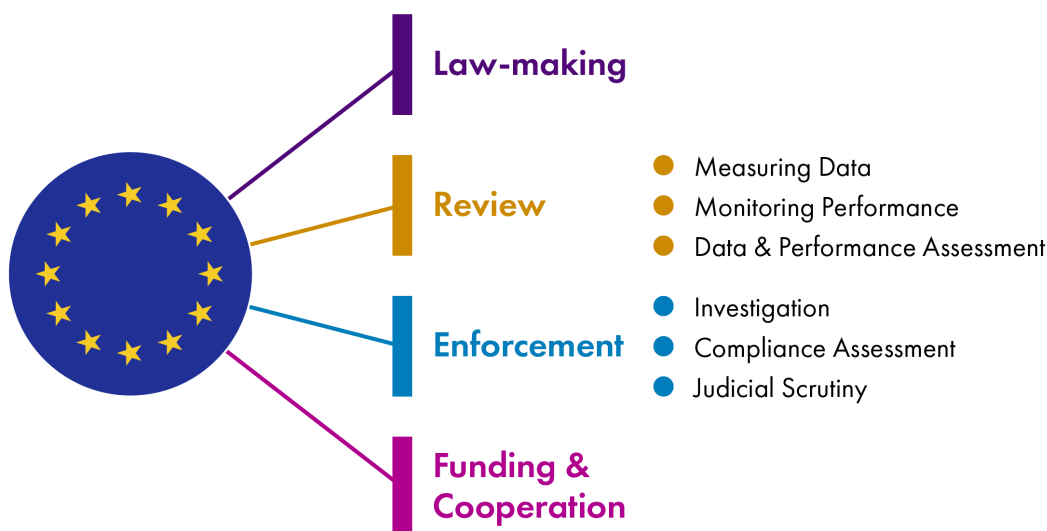
Depending on the nature of the future trading relationship between the EU and the UK, the UK will be free to diverge from EU environmental standards. However, UK businesses will have to continue to comply with EU standards concerning products (e.g. on emissions by vehicles) in order to export goods into the EU.

Scotland's ability to continue to align with EU environmental standards after EU exit will therefore depend on the shape and guise of this new trading relationship, and also on the allocation of repatriated powers after exit ([see later section on allocating repatriated governance powers](#)).

Continuation/replacement of EU environmental governance arrangements

Environmental governance in the UK presently relies upon a wide range of EU arrangements, ranging from the making of legislation, and the review of its implementation and enforcement, to financial support and cooperation activities (Figure 1).

Figure 1: EU governance functions (SPICe)



The current model of EU environmental governance arrangements are unlikely to continue to service the UK after exit. If unmitigated, the loss of EU governance arrangements would result in a series of gaps on a range of matters, such as air pollution and climate change, waste, water, and chemicals, both at the Scottish and at the UK level. EU exit therefore requires that these governance arrangements somehow be replaced.

These governance arrangements are characterised by varying degrees of EU involvement (Figure 2).

Figure 2: EU environmental governance arrangements and degree of centralisation. Adapted from SULNE ⁶

Aim	Nature Protection	Environmental rights	Regulation of activities	Regulation of products	Allocation of resources
Examples of EU legislation	Water pollution; Habitats Birds Directives	Access to justice and information; Participation in decision-making	Impact assessment; Waste; Industrial emissions; Renewable energy	Emissions from vehicles; Waste; Energy efficiency; Chemicals	Emission trading system; Common Agriculture Policy; Common Fisheries Policy
Level of decentralisation within the EU	Mainly decentralised			Mainly centralised	

In some areas EU law sets targets for Member States –for example, on renewable energy generation – leaving them discretion in deciding *how* to comply with such targets. The repatriation of EU powers in areas such as these will entail deciding who is in charge of setting targets in future, and to assess compliance with these, as well of setting consequences for lack of compliance.

In other areas, conversely, EU law applies directly, leaving almost no discretion to EU Member States – for example, on the regulation of products. After EU exit, matters such as the regulation of products might remain centralised at the UK level or become devolved⁶. The UK Government and devolved administrations are presently engaged in discussions over the development of **common frameworks** (see also [the section on allocating repatriated powers](#)). The extent to which rules to safeguard a degree of harmonisation within the internal UK market will be developed remains to be seen. See SPICe briefing [Developing the Scottish Parliament's scrutiny role after Brexit and the later section of the briefing on allocating repatriated powers](#) .

Finally, some areas are very EU centric and rely on institutional arrangements that are unlikely to service the UK following EU exit, unless a very close relationship with the EU is secured. For example, current law-making and governance arrangements on chemicals and emissions trading rely heavily on EU institutions. After EU exit, the re-allocation of powers between central or devolved administrations within the UK in areas such as these is yet to be determined and will greatly depend on the UK and Scotland's future relationship with the EU⁶ (Box 4).

Box 4: Examples of EU environmental governance arrangements that need replacing

Some of the most EU-centric areas concern the regulation of products and the repartition (allocation) of resources. For example, the [EU Emissions Trading System](#) (EU ETS) enables the trading of permits to emit greenhouse gases amongst installations across EU Member States. The [HFC Registry](#) sets quotas and ensures compliance with rules for the import and production of hydrofluorocarbons within the EU. Similarly, the [European Chemical Agency](#) (ECHA) sets and ensures compliance with rules for the import and production of chemicals within the EU. After EU exit, areas such as these require that the UK either find ways to continue to engage with these governance arrangements, or replace these arrangements with UK or Scottish ones.

The EU ETS is a case in point. The [EU-ETS Directive](#) attributes a key role to EU institutions and presently covers emissions from the UK's most carbon intensive industries. Two main scenarios can be envisioned in this connection:

1. The UK continues to use ETS as a means to reduce its emissions:

- The UK remains in the EU ETS or;
- The UK creates its own ETS and links it with that of the EU or;
- The UK creates its own ETS but does not link it with that of the EU.

2. The UK does not continue to use ETS as a means to reduce its emissions:

- The UK introduces a carbon tax and/or;
- The UK comes up with another means to reduce emissions in this sector.

The EU ETS covers a sizeable share of Scotland's emissions, making it an important means to achieve Scotland's climate targets. Present constitutional arrangements limit Scotland's powers to remain within the EU ETS, independently of the rest of the UK. See [SPICe Briefing EU Emissions Trading System](#).

In this regard, in October 2019, Scotland's Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham MSP, [wrote in a letter to the ECCLR Committee](#):

“ Officials from the UK Government and the Devolved Administrations continue to explore a **common framework** to replace the EU ETS. Feedback from the joint consultation on the future approach to carbon pricing is informing policy choices that Ministers will discuss and agree between the four administrations before the end of the year, followed by the publication of a joint government response. The Scottish Government continues to press for a UK ETS linked to the EU ETS as previously discussed with the Committee. We continue to oppose any attempt to introduce a UK carbon emissions tax as a long term alternative to the ETS.”

In preparation for EU exit, administrations across the UK have reviewed present environmental governance arrangements, in order to work out which arrangements need to be replaced and how. In the first instance, this work is aimed to ensure that

environmental law continues to function after EU exit. To this end, both the Scottish and UK Parliaments are in the process of scrutinising and passing secondary legislation, using powers provided by the [European Union \(Withdrawal\) Act 2018](#) (section 8). These powers enable Ministers “to prevent, remedy or mitigate” “any failure of retained EU law” or “any other deficiency in retained EU law”.

In a number of areas, interim working level arrangements have been agreed to manage the impact of a ‘no deal’ exit ¹. In October 2019, 46 EU Exit Scottish Statutory Instruments (SSIs) had been made under these powers, of which 8 were scrutinised by the ECCLR Committee. Over 160 UK Statutory Instruments (SIs) had been notified to the Scottish Parliament, of which 33 notifications - covering 37 SIs - were considered by the ECCLR Committee ⁷.

If the UK leaves the EU with a deal, the Scottish Government has said that “all SIs and SSIs considered by Parliament will have to be reviewed in light of the deal”. Furthermore, “consideration will be given to whether any further parliamentary scrutiny is required where it is proposed that the SIs previously considered by Parliament in the event of a no deal exit, and on a short term basis, may now themselves be considered as the basis for longer term arrangements such as common frameworks” ⁷

To identify environmental governance gaps associated with EU exit and possible solutions to address these, in 2018 the **Scottish Government** commissioned an expert report, [‘Environmental Governance in Scotland on the UK’s withdrawal from the EU Assessment and options for consideration’](#). ⁸ The report looked at the following areas:

- nature conservation and biodiversity;
- air pollution and climate change;
- access to environmental information and environmental justice;
- marine environment;
- nuclear and radioactivity issues;
- waste and circular economy;
- water;
- chemicals.

The report highlighted a series of **gaps**. For example, on **law-making**, the report noted how EU law is presently the conduit through which the UK implements many of its international obligations on several environmental matters. The report recommended that the matter of how international obligations are implemented after EU exit be looked at carefully. The matter of Ozone Depleting Substances was flagged as a specific issue for concern, as EU-level governance arrangements on products and on matters such as production and trade of Fgases are central to the UK’s compliance with international law ⁹ (see also Box 4). The report suggested that EU exit would be comparatively less problematic on matters like protected areas, which are not heavily reliant on EU governance arrangements. Even in areas such as these, however, the report drew attention to the need to ensure maintenance of present levels of **funding and cooperation**.

In this context, the report recommended continued collaboration with EU institutions – like the [European Environmental Agency](#) (EEA) and the [European Union Network for the Implementation and Enforcement of Environmental Law](#) (IMPEL) – in order to enable continued benchmarking, peer-review and peer-pressure (i.e. comparisons between Members States drawing attention to good or poor practice). Finally, the report raised a series of specific concerns over **review and enforcement** of environmental laws ([see more discussion of enforcement functions in the following section](#)).

Work on how to address these gaps after EU exit remains ongoing on both sides of the border, including discussions between the UK Government and devolved administrations on how to address some of the remaining gaps across the UK ⁷ .

Replacement of the EU's review and enforcement powers over UK authorities

EU law comes equipped with supranational supervision and enforcement machinery. Enforcement of EU law chiefly rests on the supervisory powers of the EU 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 asked to pay fines until the compliance issue has been resolved. In addition to the enforcement powers of the Commission, members of the public and pressure groups can initiate legal action before Member State courts to request compliance with EU law.

After the EU referendum, several experts – including the UK Environmental Law Association (UKELA) and the Scottish Universities Legal Network on Europe (SULNE) – identified the loss of the EU's review and enforcement powers as a pressing concern^{6 10}. In order to address this concern, [the UK](#) and [the Scottish Governments](#) have both held consultations on how to hold public authorities to account for upholding environmental standards after EU exit. To date, however, no legislative measures have been adopted by either.

The [2018 expert report commissioned by the Scottish Government](#) suggested that, after EU exit, the existing **review functions** of public bodies in Scotland – such as the Scottish Environmental Protection Agency (SEPA) and Scottish Natural Heritage (SNH) – be expanded and reviewed (see further detailed suggestions in the annex to that report). On **enforcement**, the report recommended that the EU's functions concerning scrutiny and assessment of compliance, investigation and judicial scrutiny over the activities of public authorities be replaced. The report suggested to either expand the prerogatives of existing national bodies, or to establish a new statutory body tasked with these functions. On **judicial scrutiny** specifically, the report proposed an independent panel to replace the functions performed by EU institutions in the short term; and the establishment of a dedicated body – such as an environmental court – in the long run.

The expert report served as a basis for a Scottish Government [public consultation launched in February 2019](#) to gather evidence on future arrangements for environmental governance after EU exit. The [consultation responses published in October 2019](#) converged on the need to replace the EU Commission's role in receiving complaints from the public about compliance with environmental law. The responses supported interim arrangements, and more long term solutions, such as an ad hoc independent body or watchdog. Some respondents specifically advocated for the establishment of an environmental court.

The Scottish Government had already held a [public consultation on whether to establish an environmental court](#) in March 2016. That consultation was aimed to address concerns over Scotland's compliance with obligations on access to justice under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)¹¹. See [SPICe briefing 'Human Rights and the Environment'](#) for more information.

In 2017, [the Scottish Government resolved not to establish a specialist environmental court](#), saying that the "variety of views on what sort of cases an environmental court or tribunal should hear combined with the uncertainty of the environmental justice landscape

caused by Brexit lead Ministers to the view that it is not appropriate to set up an specialised environmental court or tribunal at present". The Government committed, however, to keep the issue of whether there should be an environmental court or tribunal under review ¹² .

The governance gaps associated with EU exit have reopened the debate on ways to improve access to justice in environmental matters. The 2019-2020 Programme for Government specifies that, in the event of 'no deal' exit, interim, non- legislative measures will be taken, while continuing to develop longer-term solutions.

In October 2019, the Cabinet Secretary for Environment, Climate Change and Land Reform **announced an interim advisory panel** to ensure the "maintenance of environmental standards and implementation of environmental law in Scotland". The new interim advisory panel would "replicate as far as possible, the role of the EU Commission in scrutinising environmental compliance by the Scottish Government and other public bodies" ¹³ . Specifically, the panel would:

- undertake fact-finding and analyse work on key areas of compliance with environmental law;
- advise Scottish Ministers; and
- seek changes to rectify any issues.

The panel would also deal with pending infringement cases before EU institutions, although it is yet not clear what power the panel will have in this connection. At an evidence session of the Scottish Parliament's Environment Climate Change and Land Reform Committee, the Cabinet Secretary confirmed that there are six such cases currently pending.

The Scottish Government is still developing proposals for long-term arrangements. It is therefore presently not possible to gauge what these proposals may look like. In a **letter to the ECCLR Committee on 24 October 2019** however, the Cabinet Secretary, Roseanna Cunningham MSP, said:

" The Scottish Government is considering a range of institutional models for a future Scottish governance function, and how it can be carried out constructively, to seek remedy and agreement to environmental improvements. This must ultimately be backed by some form of sanctions, which - while likely to be rarely taken - would provide an incentive for public bodies to correctly apply environmental law and engage with governance where failings are under consideration. While we cannot recreate the enforcement role of the European Court of Justice in a domestic setting, the governance function must have a range of actions it can take that are proportionate and fit with the existing roles of the Scottish Parliament and Courts. "

In a **2019 report Scottish Environment Link** advocated for the creation of an independent Parliamentary Commissioner for the Environment, a dedicated Environment Court and "a stronger, more pacey, engaged and transparent as well as better aligned set of administrative arrangements, including audit and parliamentary accountability" ¹⁴ .

The UK Government has also **proposed to establish a "commission-like body"** to oversee "all environmental law". A **2018 UK Government consultation** explored the functions of this "new, independent, statutory environmental body to hold government to account on the

environment”. The (now fallen) [Environment Bill 2019](#) provided for the establishment of an Office for Environmental Protection (OEP), as an independent non-departmental public body, expected to employ up to 120 staff. The OEP would provide scrutiny and advice functions, and monitor progress in accordance with the UK Government’s domestic environmental plans and targets. It would replace the role of the European Commission in respect of environmental compliance, engaging with public authorities to manage compliance issues relating to environmental law. Legal proceedings would only be taken as a last resort or in urgent cases. As mentioned above, the Environment Bill fell with the dissolution of Parliament ahead of the general election, and it is presently not possible to gauge how legislation introduced by the new UK Government will deal with this matter.

In its commentary on the Bill, **Greener UK and Wildlife and Countryside Link** welcomed the establishment of the OEP but lamented that the Bill did not give it “a sufficiently wide remit to ensure adequate environmental governance or to properly fulfil its potential.” Specifically, they called for a move away from “traditional judicial review”, calling for the recognition of the important role of civil society in ensuring compliance with environmental law⁵.

Scotland’s Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham MSP has expressed frustration over lack of clarity over issues on which the OEP might be able intervene in Scotland. She [said in evidence to the Environment Climate Change and Land Reform Committee on 29 October 2019](#):

“ Our perspective is that the proposed OEP should have no role in respect of devolved issues. We have never had clarity on what the UK Government thinks are the issues on which the proposed OEP might intervene; that is something that we have been unable to establish. ”

The role of EU environmental law principles in future policy making

Environmental law is underpinned by a set of principles, which may be defined as policy statements “concerning how environmental protection and sustainable development ought to be pursued”¹⁵. These principles are not only found in EU law, but also feature in a host of national and international environmental law instruments all over the world.

Environmental principles concern typically:

- how the law is made (for example, through public consultation and participation),
- how it is enforced (for example, by guaranteeing access to justice to certain groups or interests), and
- its substantive content (for example, when they are incorporated into legislative instruments or into the design of regulatory structures and processes).

EU environmental law hinges on four core principles which originated in [Organisation of Economic Co-operation and Development legal instruments](#), and which feature in a host of EU instruments and policy documents. According to [Article 191.2 of the Treaty on the Functioning of the European Union \(emphasis added\)](#):

“ Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the **precautionary principle** and on the principles that **preventive action** should be taken, that **environmental damage should as a priority be rectified at source** and that **the polluter should pay.** ”

Another two principles that are not included in Article 191.2 TFEU are commonly listed as part of EU environmental law, namely: the *integration principle* i.e. that environmental protection requirements should be integrated into other policy areas; and the *principle of sustainable development* i.e. that of ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’¹⁶.

These principles are binding on the EU legislature and on Member States when they implement EU law. EU environmental law principles, therefore, do not have practical legal force in and of themselves. Their incorrect application and interpretation can nonetheless be challenged before the EU’s and Member States’ national courts.

Upon EU exit, public authorities in the UK will no longer be required to ensure that EU environmental principles guide law and policy-making. Both the UK and the Scottish Governments have vowed to ensure that EU environmental principles continue to be enshrined in law. The mechanisms of achieving this have been the subject of much debate, but so far no measures have been adopted by either government in this regard.

[Responses to the 2019 Scottish Government’s public consultation](#) supported the introduction of a specific duty for Ministers to uphold EU environmental law principles in the formation of policy, including in proposals for legislation. Respondents suggested that the duty should be enshrined in legislation, that it might cover public authorities other than Ministers, and activities other than the formation of policy. Some respondents

recommended that principles not mentioned in the consultation document – such as for example, sustainable development, integration or non-regression – be included in the scope of the duty.

The Programme for Government for 2019-2020 announced that a Continuity Bill would include measures “to ensure that we maintain the role of environmental principles”. In a [letter to the Environment Climate Change and Land Reform Committee dated 24 October 2019](#), Scotland’s Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham MSP wrote:

“ Regardless of the nature of the UK’s exit from the EU, the Scottish Government has committed to maintain or exceed environmental standards following EU exit and will bring forward legislative proposals to ensure the four EU environmental principles continue to sit at the heart of environmental policy and law in Scotland. These are: ”

- Precautionary principle; where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost- effective measures to prevent environmental degradation. ”
- Polluter Pays principle; the polluter should bear the cost of pollution control and remediation. ”
- Prevention principle; preventative action should be taken to avoid environmental damage. ”
- Rectification at Source principle; environmental damage should, as a priority, be rectified at source. ”

The [European Union \(Withdrawal\) Act 2018](#) (section 16) required the UK Government to publish a draft Bill setting out a set of environmental principles and provisions for having regard to them. The (fallen) [Environment Bill 2019](#) introduced before the UK Parliament in October 2019 provided for a “policy statement on environmental principles”, namely:

“(a) the principle that environmental protection should be integrated into the making of policies,

(b) the principle of preventative action to avert environmental damage,

(c) the precautionary principle, so far as relating to the environment,

(d) the principle that environmental damage should as a priority be 25 rectified at source, and

(e) the polluter pays principle.”

The Bill provided that the statement would explain “how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.” The statement may furthermore explain “how Ministers of the Crown, when interpreting and applying the environmental principles, should take into account other considerations relevant to their policy.”

Greener UK and Wildlife and Countryside Link expressed concerns over the way in which environmental principles were dealt with in the (fallen) Environment Bill:

“ The clauses on environmental principles are largely unchanged from the draft Environment (Principles and Governance) Bill, despite very clear evidence that emerged during pre-legislative scrutiny, including from leading academics on the need for these clauses to be strengthened. The bill constitutes a significant and unacceptable weakening of the legal effect of the principles. (...). Moreover, the bill is relegating these vitally important legal principles to little more than creatures of policy.
5 ”

On the policy statement specifically, **Greener UK and Wildlife and Countryside Link** lamented that “only Ministers, not public authorities, must have ‘due regard’ to this statement when making policy but the requirement does not apply to decision making in individual cases and is subject to wide ranging exemptions” It concluded:

“ Currently, under EU law the environmental principles are binding on all public authorities including in individual administrative decisions. This legal obligation on all public authorities to apply the principles whenever relevant will be lost through the bill.
”

Allocating repatriated governance powers between the UK and devolved administrations after EU exit

The repatriation of powers presently exercised by the EU raises fundamental questions concerning the allocation of powers between the UK's administrations. Since devolution, the EU has provided an element of commonality in environmental standards across the UK.

The UK Government estimates in its 2019 'Frameworks Analysis' that between 107 and 111 areas of EU law fall within the devolved competence of the Scottish Parliament ¹⁷. The UK Government has identified 12 policy areas which it considers reserved, but which are subject to ongoing discussion with devolved administrations.

The UK and the devolved governments have agreed "in principle" to work together to develop **common frameworks** in some areas which are currently governed by EU law in areas of competence of the devolved administrations or legislatures ¹⁸. These frameworks are meant to provide long term policy arrangements to be implemented by the end of the transition period at the end of 2020. The Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, [explained to the Finance and Constitution Committee in February 2019](#):

" Frameworks remain discrete longer-term arrangements that are to be put in place post-Brexit. They will be agreed only when there is clarity about the UK's final agreement, the future relationship with the EU and the situation in Northern Ireland. The progress on frameworks will therefore continue until the end of the implementation period, if that is December 2020—although, again, that is absolutely up for grabs. "

See [SPICe briefing 'Common UK Frameworks after Brexit'](#) for more information.

Section 12 of the EU (Withdrawal) Act introduced powers for the UK Government to apply, by regulations, a temporary 'freeze' on devolved competence in specified areas - which the [Scottish Government described as a 'devolved power curb' and has stated that if the UK Government tried to introduce a section 12 order it would "not continue co-operation"](#). An update published by the UK Government on the development of Common Frameworks in October 2019 said:

" The UK Government has not sought to make use of the powers to apply retained EU law restrictions at this juncture. As outlined earlier in this report, significant progress is being made across policy areas to establish common frameworks in collaboration with the devolved administrations. The 'freezing' powers provide a mechanism to give certainty across those areas where common rules do need to be maintained, by ensuring that there will not be substantive policy change in different parts of the UK until those future arrangements are in place. In order to remove those powers from the statute book, further progress towards the implementation of common frameworks would be needed. We will keep this position under review, in line with the statutory duty in section 12(10) of the EU (Withdrawal) Act. ¹⁹ "

The [2018 Scottish Government roundtable report on governance](#) highlighted the risk of **regulatory fragmentation** within the UK after EU exit, noting that limited progress to avoid this had been achieved. The report pointed to the [Marine Policy Statement \(MPS\)](#) as a possible model for future cooperation between UK jurisdictions. The MPS commits all UK jurisdictions to the high level policy goals, leaving each jurisdiction responsible for implementation in their areas of competence (similar in a sense to how EU framework Directives tend to work).

Even though environmental issues are a devolved matter, **international affairs including relations with international organisations** are reserved to the UK Government ([Scotland Act 1998, schedule 5, s 7](#)). This means that, while the Scottish Parliament can legislate on environmental matters at home – such as, for example, fisheries – the Scottish Government is limited in its ability to enter formal negotiations with international parties to address Scottish interests. So Scottish Ministers' ability to exercise their powers on matters such as fisheries after EU exit may be framed by the UK Government decisions in this connection. In [written evidence to an inquiry by the House of Lords EU Energy and Environment Sub-Committee](#), the Cabinet Secretary for the Rural Economy, Fergus Ewing MSP stated:

“ [We] believe the importance of fisheries also demonstrates why the Scottish Government must be involved directly in shaping the UK position as well as with any discussions with other countries in order to reflect and protect Scotland's interests. We have yet to have confirmation from the UK Government that this will indeed be the case, that we will be **treated as an equal partner and assume the lead negotiating role where we have the majority interest.**” (Emphasis added)”

Finally, after EU exit Scottish environmental laws and policies will need to operate within the **parameters set by future UK trade agreements**, and by rules on the **UK internal market**. On this first matter, the Scottish Government may not take any action, or fail to act, in a way that is 'incompatible with international obligations' (Scotland Act 1998, s 58). After EU exit, the UK could be under pressure to accept to lower environmental standards than those of the EU, in order to agree new free trade agreements. So, while trade agreements may not prevent Scotland from adopting legislation keeping pace with EU environmental standards, they may engender a situation whereby Scottish business would be placed at a competitive disadvantage if required to comply with more ambitious standards –for example on agriculture products– vis-à-vis the rest of the UK and the UK's new trade partners.

On the second matter, it is not yet known how rules on the UK internal market may affect the ability of the Scottish Government to align with EU law in future and its exercise its competence in devolved environmental matters. Challenges may however arise in certain areas where law-making has so far been more EU centric. For example, should the UK Government decide to pursue different product standards, or a different approach to chemicals regulation to that of the EU, the Scottish Government's ambition to continue to align with EU law could be frustrated.

Key issues for future consideration

This briefing has taken stock of the key issues raised by EU exit for environmental governance in Scotland, summarising the state of play.

The degree of Scotland's **future alignment with EU environmental standards** will depend on the relationship between the EU and the UK, and on the allocation of repatriated powers after exit.

Work to **replace extant EU environmental governance arrangements** – such as emissions trading and chemicals regulation – is underway and remains ongoing on both sides of the border.

While both the UK and the Scottish Governments have agreed on the need to replace the EU's **review and enforcement powers** over public authorities in the UK, and to maintain the role of **EU environmental law principles** in future policy making, solutions in both connections are still under discussion, with legislation expected to be introduced on both sides of the border in 2020.

Equally, the debate concerning the **allocation of repatriated powers** between the UK and devolved administrations presently exercised by the EU remains ongoing. This allocation requires **political agreement** on who will be doing what after EU exit, and pursuant to which rules.

Given environmental law's composite nature, no one-size-fits-all solution for all areas is likely to be feasible, or even desirable.²⁰ Instead, present environmental governance arrangements should be looked at, in order to establish what would be the most effective and sensible way to reform the ones which need replacing. In some areas, where transboundary issues are at stake, the need for some UK-wide coordination seems obvious. EU exit however also provides an opportunity to explore a different model. Some commentary has suggested that Scotland could request greater devolved powers to effectively exercise its competences after EU exit – such as some legal capacity to enter into international agreements addressing specific Scottish interests, such as fisheries.²¹

What seems clear is that the quest for solutions to bridge the gaps in environmental governance associated with EU exit continues. While recent announcements on interim solutions on the enforcement of environmental law have shed some light on what may be expected in the event of a no deal EU exit, much uncertainty remains on intra-UK arrangements and on what more long-term solutions may be adopted, on both sides of the border.

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