

## ENVIRONMENT - NOTIFICATION TO THE SCOTTISH PARLIAMENT

### The Environment (Legislative Functions from Directives) (EU Exit) Regulations 2019

#### 1. Name of the instrument and summary of proposal

The Environment (Legislative Functions from Directives) (EU Exit) Regulations 2019 transfer a series of legislative functions that are currently conferred upon the European Commission (the Commission) to various UK administrations. This will ensure those functions can continue to be exercised after the UK leaves the EU.

The Regulations bring together a number of provisions relating to various policy areas, which need to be considered under the affirmative procedure at Westminster. The proposals in this notification should be read alongside the notifications already sent to the Scottish Parliament which relate to:

- The Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2019;
- The Air Quality (Miscellaneous Amendment and Revocation of Retained Direct EU Legislation) (EU Exit) Regulations 2018;
- The Marine Environment (Amendment) (EU Exit) Regulations 2018;
- The INSPIRE (Amendment) (EU Exit) Regulations 2018;
- The Floods and Water (Amendment etc.) (EU Exit) Regulations 2019; and
- The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019.

#### 2. Explanation of law that the proposals amend and summary of proposals

The Regulations transfer functions, which currently are exercised by the Commission, from Directives relating to air quality; environmental noise; INSPIRE; marine environment; water quality and sewage sludge. A summary of the law in each area, and the proposed transfers of functions, are provided below.

##### *a. Air Quality*

Part 2 of the Regulations transfer functions from the Commission under various Directives relating to air quality which impact on devolved interests. Where references below say that functions are transferred to appropriate authorities, the appropriate authority in Scotland is the Scottish Ministers. The Scottish Ministers can, therefore, make regulations in Scotland. The Secretary of State can also act as the appropriate authority in Scotland, if Scottish Ministers' consent is given, enabling regulations to be made for the whole of the UK, where appropriate. A description of the functions transferred in each Directive is provided below.

**Directive 2008/50/EC of the European Parliament and of the Council on ambient air quality and cleaner air for Europe.** One power is transferred to the appropriate authority. The appropriate authority may, by regulations, amend cross-references to, or the corresponding provision to, specified annexes to the Directive in domestic legislation. This power is limited to non-essential elements of specified Annexes to

the Directive covering data quality, reference methods for assessing air quality, pollutant concentration thresholds above which assessment should take place, location and number of sampling points, and information to be included in plans for improving air quality.

**Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control).** Three powers are transferred to the appropriate authority. Firstly, the appropriate authority may update, by regulations, cross-references to, or the corresponding provision to, particular parts of specified Annexes of the Directive in domestic legislation, where it is appropriate to do so in the light of technical and scientific progress. These specified Annexes contain technical provisions relating to combustion plants, waste incineration and waste co-incineration plants and installations and activities using organic solvents. Secondly, the appropriate authority may, by regulations, make provision amending cross-references to, or the corresponding provision to, particular parts of the Directive in domestic legislation so far as they concern start-up and shut-down periods. Thirdly, the appropriate authority may, by regulations, make provision concerning the type, format and frequency of information to be reported to appropriate authorities in so far as it is information held as a result of measures that implement the Directive, including specifying activities and pollutants for which information is to be reported.

**Directive 2015/2193/EU on the limitation of emissions of certain pollutants into the air from medium combustion plants.** One power is transferred to the appropriate authority. The appropriate authorities may, by regulations, update cross-references to, or the corresponding provisions to point 2 of Part 2 of Annex 3 of the Directive, where it is appropriate to do so in the light of technical and scientific progress. This is a technical provision relating to the calculation of average emission values, and will become out of date unless amended and updated to take account of technical and scientific advances.

**Directive 2016/2284/EU on the reduction of national emissions of certain atmospheric pollutants.** The Directive implements at EU level obligations under the United Nations Economic Commission for Europe (UNECE) Convention on Long-Range Transboundary Air Pollution of 1979 (CLRTAP). The UK is a signatory to CLRTAP and will therefore need to continue complying with the requirements after EU exit. As the obligation is on the UK, for practical reasons, powers are transferred to the Secretary of State, but the consent of Scottish Ministers is required before regulations can be made in relation to Scotland. The transferred powers enable the Secretary of State, by regulations, to make provision for or in connection with the format of a national air pollution control programme for reducing emissions of certain pollutants. The Secretary of State may by regulations, where appropriate in light of scientific or technical progress, update or amend cross-references to, or the corresponding provision to, Directive annexes relating to monitoring, reporting, emissions reduction measures and reporting or inventory preparation. The Secretary of State must have regard to any request made by the Scottish Ministers when making regulations.

Part 2 of the Regulations also contains a consultation requirement. This provides that, before the appropriate authority or the Secretary of State can make regulations in exercise of the functions transferred, they must consult with such bodies or persons

as appear to them to be representative of the interests likely to be substantially affected by the regulations and such other persons as they consider appropriate.

*b. Environmental Noise*

Part 3 of the Regulations transfers powers from the Commission to Scottish Ministers under **Directive 2002/49/EC relating to the assessment and management of environmental noise**. These powers enable the Scottish Ministers to update, by regulations, cross-references to, or the corresponding provision to, Annex 1, point 3 and Annex 2 of the Directive in domestic legislation, where it is appropriate to do so in the light of technical and scientific progress. These are complex technical provisions relating to supplementary noise indicators and the noise mapping assessment methodology respectively, and will become out of date unless amended and updated to take account of technical advances and experience in their application.

The Secretary of State may also make regulations for the whole of the UK, with the consent of the Scottish Ministers in relation to Scotland, in respect of this provision.

*c. INSPIRE*

Part 4 of the Regulations, transfers to the Secretary of State and the Scottish Ministers the legislative functions of the Commission under **Directive 2007/02/EC on the operation of national spatial data infrastructures using common standards that make spatial data easy to find, use and reuse**.

These legislative functions relate to rules for the implementation of the Directive. Part 4 confers on the “appropriate authority” broadly equivalent regulation-making powers to make provision in relation to:

- metadata for spatial data sets and services;
- interoperability and harmonisation of spatial data sets and services;
- network services for spatial data sets and services; and
- monitoring and reporting of infrastructures for spatial information.

For regulations applying in relation to Scotland, the Scottish Ministers are the appropriate authority. For regulations applying in relation to England, Wales or Northern Ireland, the Secretary of State is the appropriate authority. However, if the Scottish Ministers consent, the Secretary of State may also exercise these powers to make regulations applying in relation to Scotland.

*d. Marine Environment*

Part 5 of the Regulations transfers legislative functions of the Commission under the **Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy** (Marine Strategy Framework Directive) to the Secretary of State.

The Marine Strategy Framework Directive has already been transposed and implemented in the United Kingdom through the Marine Strategy Regulations 2010. However, the Commission has powers under the Marine Strategy Framework Directive to make legislation laying down criteria and methodological standards to be

used by Member States and to adopt specifications and standardised methods for monitoring and assessment of the marine strategy area. After exit, these roles of the Commission will need to be carried out in the UK, rather than at an EU level. New regulation-making powers therefore need to be established to ensure that the marine strategy programme continues to operate effectively.

The Regulations inserts a new Part 6 into the Marine Strategy Regulations 2010 to transfer the Commission's legislative functions to the Secretary of State, in the form of regulation-making powers. When transposing the Marine Strategy Framework Directive in 2010, the four administrations agreed to a single transposition for the whole of the UK. The Marine Strategy Regulations 2010 therefore apply to the Scottish inshore region and the Scottish offshore region (as well as the rest of the UK's inshore and offshore waters).

The marine environment is a complex area of devolution. Marine planning, licensing, and conservation are legislatively devolved for the Scottish inshore region (0-12nm), but only executively devolved in Scottish offshore waters (12-200nm). The Marine Strategy Regulations 2010 therefore contain provisions that relate to both reserved and devolved matters.

Although regulation-making powers are being given to the Secretary of State, there are two consent provisions to ensure that the devolution settlement is respected. First, the Secretary of State must seek the Scottish Ministers' consent before making regulations in relation to Scotland or the Scottish inshore region. Second, the Secretary of State must seek the Scottish Ministers' consent before making regulations that may affect or are likely to affect the exercise of a function of the Scottish Ministers. This means that consent must be sought if the proposed regulations would affect the exercise of the Scottish Ministers' executively devolved competence in relation to the marine strategy.

In addition to seeking consent from the devolved administrations, the new provisions require the Secretary of State to consult the devolved administrations and any other persons as appear to the Secretary of State to be interested in or affected by the making of the regulations, including the OSPAR Commission, before making regulations.

Due to the complex devolution settlement described above, the Scottish Ministers' consent to Part 5 of the Regulations is only required under the protocol in relation to the extent that the provisions apply to the Scottish inshore region (bearing in mind that the provisions apply without distinction to both the inshore and offshore regions).

#### *e. Water Quality*

Part 6 of the Regulations transfer legislative powers the Commission has to make technical amendments in respect of a number of Directives pertaining to the water environment and to water industry. These are the **Water Framework Directive 2000/60/EC**, the **Groundwater Directive 2006/118/EC**, the **Priority Substances Directive 2008/105/EC**, the **Bathing Water Directive 2006/7/EC** and the **Nitrates Directive 91/676/EEC**, the **Drinking Water Directive 1998/83/EC** and the **Urban Waste Water Treatment Directive 1991/271/EEC**.

Part 6 transfers functions from the Commission to appropriate authorities. The appropriate authority in Scotland is the Scottish Ministers. The Scottish Ministers can, therefore, make regulations in Scotland. The Secretary of State can also act as the appropriate authority in Scotland, if the Scottish Ministers' consent is given, enabling regulations to be made for the whole of the UK, where appropriate.

Chapter 2 of Part 6 deals with functions under the **Water Framework Directive**, and transfers legislative functions of the Commission to the appropriate authority, conferring the power to make regulations in relation to the following matters: the economic analysis to be carried out for each River Basin District; and the monitoring of water quality.

Chapter 3 of Part 6 deals with functions under the **Groundwater Directive**, and transfers legislative functions of the Commission to the appropriate authority, conferring the power to make regulations regarding groundwater threshold values; the procedure for assessing groundwater chemical status; and upward trends in groundwater pollutants.

Chapter 4 of Part 6 deals with functions under the **Priority Substances Directive**, and transfers legislative functions of the Commission to the appropriate authority, conferring the power to make regulations regarding the watch list of substances; and environmental quality standards for certain metals.

Chapter 5 of Part 6 deals with functions under the **Bathing Water Directive**, and transfers legislative functions of the Commission to the appropriate authority, conferring the power to make regulations regarding public information to be provided; methods for analysis of microbiological samples; and the handling of samples.

Chapter 6 of Part 6 deals with functions under the **Drinking Water Directive**, and transfers legislative functions of the Commission to the appropriate authority, conferring the power to make regulations in connection with the monitoring of drinking water.

Chapter 7 of Part 6 deals with functions under the **Urban Waste Water Treatment Directive**, and transfers legislative functions of the appropriate authority, conferring the power to make regulations regarding the requirements of collecting systems, requirements for discharges from urban waste water treatment plants, and requirements for discharges of industrial waste water.

Chapter 8 of Part 6 deals with functions under the **Nitrates Directive**, and transfers legislative functions of the Commission to the appropriate authority, conferring the power to make regulations regarding the criteria for identifying affected waters; the associated action programme; and methods of measurement for nitrate concentrations.

*f. Sewage Sludge*

Chapter 9 of Part 6 deals with functions under **Directive 86/278/EEC** on the protection of the environment, and in particular of the soil, when sewage sludge is used in

agriculture. Chapter 9 transfers legislative functions of the Commission to the appropriate authority, conferring the power, where there has been scientific and technical progress, to:

- update limit values of pollutants in sludge and in soil on which its use is considered;
- make provision about the analysis of sludge and soil; and
- make provision about reference methods for sampling and analysis of soil and sludge.

Chapter 10 of Part 6 contains a consultation requirement. Before making regulations under Part 6 (save for under the Drinking Water Directive power), the appropriate authority must consult with the appropriate agency for the relevant jurisdiction (SEPA for regulations applying in Scotland), and such other persons as considered appropriate. For the Drinking Water Directive power, the appropriate authority must consult with the appropriate regulator (for regulations applying in Scotland, the Drinking Water Quality Regulator for Scotland) and such other persons as considered appropriate.

### **3. Why are these changes necessary?**

These changes are necessary to allow the continuation of the effective functioning of the legislation which implements the relevant Directives, so that legislative functions currently exercised by the Commission can continue to be exercised. In each policy area, legislative functions are transferred to the authority who will exercise that function after EU exit.

### **4. Scottish Government categorisation of significance of proposals**

Category B. These Regulations are wholly concerned with the transfer of functions which previously rested with EU entities to the relevant authority within the UK.

### **5. Impact on devolved areas**

The policy areas impacted by these Regulations engage a mix of reserved and devolved competence. Our primary objective in working with UK Government on these has amendments has been to ensure that Scottish Ministers can continue to effectively manage these policy areas and that the devolution settlement is respected. Particular provisions of note are described further below.

#### *a. Air quality*

The functions in respect of the air quality Directives, with the exception of Directive 2016/2284, are transferred to the appropriate authority, which is the Scottish Ministers for regulations in relation to Scotland. If the Scottish Ministers consent, the Secretary of State may also exercise these powers to make regulations applying in relation to Scotland. The requirement of consent protects devolved interests.

The functions in relation to Directive 2016/2284/EU on the reduction of national emissions of certain atmospheric pollutants are transferred to the Secretary of State. However, the consent of Scottish Ministers is required before regulations can be made

in relation to Scotland, which protects our devolved interests. Although air quality is devolved, the powers transferred from Directive 2016/2284 relate to policies and other procedures which are currently exercised on a joint UK basis for reasons of practicality, efficiency and ease of collaboration. The intention is for this approach to continue and the UK Government cannot make any changes in relation to Scotland, without first obtaining the consent of the Scottish Ministers.

*b. Marine environment*

The marine environment is a complex area of devolution. Marine planning, licensing, and conservation are legislatively devolved for the Scottish inshore region (0-12nm), but only executively devolved in Scottish offshore waters (12-200nm). Part 5 of this instrument creates a new Part 6 in The Marine Strategy Regulations 2010, which applies on a UK-wide basis. The new Part 6 therefore contains provisions that relate to both reserved and devolved matters.

The regulation-making powers have been transferred from the Commission to the Secretary of State to exercise on behalf of all administrations in order to continue the existing UK-wide approach to the marine strategy. This will ensure continuity and consistency of marine environmental monitoring and standards throughout UK waters. It will also ensure that the UK can continue to develop its marine strategy in coordination with other countries within the same marine region or sub region.

The Scottish Government has liaised with the UK Government in order to ensure that the devolution settlement is respected. As explained above, the Secretary of State is required to consult with the Scottish Ministers before making regulations and also to seek their consent if the regulations may affect or are likely to affect the exercise of a function of the Scottish Ministers (notably executively devolved competence in relation to the Scottish offshore part of the marine strategy area) or if the regulations apply to the Scottish inshore region. Scottish Ministers are satisfied that the UK Government's proposals protect the existing marine strategy framework, allow for the continuation of existing cooperative framework and fully protect the devolution settlement.

*c. Water environment and water industry*

As explained above, for the legislative functions transferred under these Directives, the powers are conferred on the "appropriate authority", which is the Scottish Ministers for any regulations applying in relation to Scotland; and the Secretary of State for regulations applying in England. But if the Scottish Ministers consent, the Secretary of State may also exercise these powers to make regulations applying in relation to Scotland. This protects devolved interests.

The greatest area of discussion has been around determining the "appropriate authority" in the cross-border Solway Tweed River Basin District (RBD), as Defra wished to grant primacy to the Secretary of State. After discussion we have secured that the same approach outlined above should apply equally in the Solway Tweed RBD, so this means that Scottish Ministers can make regulations in the Scottish part of the RBD. This ensures devolved interests are protected.

## **6. Stakeholder engagement/consultation**

We have written to our stakeholders setting out the general approach we are taking to correcting deficiencies in environmental legislation and we are in regular contact with all our stakeholders regarding the move towards leaving the EU. However, these measures are aimed solely at preserving the functioning of the law as it stands at present and, therefore, we have not undertaken any engagement, or any formal consultation, about these specific amendments.

## **7. Any other impact assessments?**

On the basis that these amendments do not result in any policy changes, no impact assessment has been prepared.

## **8. Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation**

Scottish Ministers consider that consenting to the Regulations is the most effective and transparent way to make changes to address deficiencies which require a UK-wide approach. Officials have worked with UK Government to ensure the drafting delivers for our interests and respects devolved competence in Scotland.

## **9. Do the proposed changes adhere to the environment and animal principles?**

Yes. The guiding principles on the environment as set out in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union are relevant to these proposals. The legislation implementing the relevant Directives is already in line with these principles, and as no policy changes are being introduced, it is considered that these transfers of functions are in adherence with these principles.

## **10. Are there governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?**

Scottish Ministers are consulting on the governance gaps that will be created once the UK leaves the EU, with a view to bringing proposals back to the Scottish Parliament on environmental governance arrangements once the future relationship is clear.

We have engaged in framework discussions in some of the policy areas covered by these Regulations with other UK administrations and the relevant regulators. These framework discussions are progressing. Scottish Ministers' position is that these arrangements should be based on staying closely aligned with the existing EU regimes and maintaining existing standards of protection for health and the environment.

## **11. Intended UK laying date**

7 May 2019

## **12. Does the Scottish Parliament have 28 days to scrutinise Scottish Ministers' proposal to consent?**



Yes. The Regulations are subject to affirmative procedure and will be laid on 7 May 2019 in draft. The Chancellor of the Duchy of Lancaster Minister for the Cabinet Office has given an undertaking that the UK Government will not schedule debates for affirmative SIs until the Scottish Parliament has given a view on the notification under the protocol. We would welcome a view from the committee as soon as possible, however the Scottish Parliament will have 28 days for consideration if needed under the agreed protocol to consider the proposal to consent to the Regulations.

### **13. Information about any time dependency associated with the proposal**

Defra have assessed that none of the provisions in the Regulations are critical for EU exit, which is why the Regulations will be laid (as at the time of writing) after exit. Scottish Government agrees with this assessment.

After exit, the law as it currently stands in these areas will continue to function as the domestic legislation which transposed the EU Directives will be preserved under the EU (Withdrawal) Act 2018. Provisions which currently enable the EU Commission to make alterations to technical details, will be temporarily lost until such time as the provisions come into force. This is because the powers in Directives for the Commission to make such changes are not currently incorporated into domestic law. Whilst technical changes such as these are necessary from time to time, officials have assessed that the powers are not crucial to have in place for exit, in a no deal scenario.

### **14. Any significant financial implications**

There are no financial implications associated with the proposals.

Lead Official: Katy Hindmarsh  
Environment and Land Use Strategy Division