

SPICe Briefing

Implications of Leaving the EU – Environment

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This briefing highlights the EU framework that relates to environment policy and explores the implications that leaving the EU may have on Scotland's approaches to the environment.

The briefing also sets out some views on how alternatives to EU membership may impact on Scotland's approaches to environmental protection and some of the challenges associated with untangling EU, UK and Scottish environmental law.



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EXECUTIVE SUMMARY

It is too early to say what the impact of leaving the EU will be on Scotland's approaches to protecting the environment. However the EU has a significant influence on environmental protection in Scotland in a variety of ways including:

- Developing legislation that set out policy frameworks and targets aimed at supporting EU-wide action.
- Providing an enforcement mechanism to support compliance with EU environmental legislation.
- Establishing initiatives that develop EU-wide approaches on particular issues, develop expertise and share best practice.
- Providing grant funding to support the implementation of EU legislative or policy initiatives.
- Representing Member States in negotiating and supporting the implementation of international agreements.

EU environmental law spans many issues including air quality, biodiversity protection, climate emissions, marine protection, waste and water quality. A range of legislation and regulations have been developed in Scotland to implement aspects of EU environmental law.

The nature of the impact that leaving the EU may have on Scotland's approach to environmental protection is likely to depend on the nature of any subsequent relationship that the UK develops with the EU, and the domestic policy approaches adopted. Participation in the European Free Trade Area (EFTA) and European Economic Area (EEA) would result in many of the EU environmental laws applying, albeit compliance with some significant environment legislation including the EU Nature Directives is not a condition of participating in the EEA. Environmental issues are largely devolved and therefore outwith the EU, EEA and EFTA Scotland could choose to develop a wide range of new or different approaches.

In practice untangling EU, UK and devolved environmental legislation will not be a straightforward task given the variety of ways that EU law is integrated into UK and Scottish law and the process of editing, amending or repealing domestic legislation that relates to EU environmental law will be complex and take some time.

The potential implications of leaving the EU on environmental standards in Scotland have been raised by many including academics, the Scottish Government, MSPs and interest groups. While there is no single consensus a number of them highlight significant threats and challenges that the move poses. In addition concerns have been raised at the potential loss of EU funding that supports environmental research and practical programmes of work in Scotland.

INTRODUCTION

On 23 June 2016, the United Kingdom voted in a referendum to leave the European Union (EU). This is one of a series of briefings which examine the implications of leaving the EU for Scotland in a number of policy areas.

EU ENVIRONMENTAL POLICY

The initial treaties that founded what is now the EU did not explicitly refer to a power for the EU to act in order to protect the environment. EU competence in this area grew originally from a desire to improve how the Single Market operated. The growth of awareness and concern about environmental protection subsequently resulted in the development of EU competence in this area that now spans most aspects of environmental policy (UK Government [2014](#)).

As part of the EU Single European Act (1987) that revised the Treaty of Rome, powers on environmental issues were increased permitting the Community 'to preserve, protect and improve the quality of the environment, to contribute towards protecting human health, and to ensure a prudent and rational utilization of natural resources' (Eur-lex [1987](#)). The Treaty of Amsterdam (Europa [1999](#)) added further provisions requiring environmental protection requirements to be integrated into the implementation of the EU's other policies 'with a view to promoting sustainable development'. Alongside this the provisions introduced the 'precautionary principle' and 'polluter pays' principle.

On environmental issues competence is classed as a 'shared competence' – this means that either the EU or Member States can act on the issue. Where the EU develops environmental legislation that sets specific standards it can only set the minimum standards, leaving Member States free to maintain existing standards that may be higher or introduce more ambitious measures (so long as they are compatible with EU treaties including the operation of the single market).

The EU has developed environmental legislation in a broad range of environmental areas including air quality, climate emissions, habitats and species protection, waste and water quality.

The EU has also developed a wide range of environmental policy approaches and voluntary initiatives. Examples include the 7th EU Environmental Action Programme, EU Sustainable Development Strategy, EU Green Public Procurement initiative. It also provides grants to support work in some specific areas, for example LIFE funding that provides support to environmental and nature conservation projects.

In addition the EU also plays an active role in negotiating and implementing a wide range of international agreements that relate to the environment and often represents the UK (and other Member States) on UN initiatives relating to matters of EU competence.

This section sets out some significant EU legislation and policy initiatives, and how they are implemented in Scotland, in the following areas:

- Air quality
- Birds and habitats
- Marine protection
- Waste and resource use
- Water quality

The EU has also developed policy and legislative approaches on other environmental issues, for example environmental assessment, chemicals and access to environmental justice. In addition EU policies in a number of other areas for example agriculture, climate change, energy and fisheries also have a major impact on the environment. SPICe have published separate briefings on the implications of leaving the UK on climate change (Barlow [2016](#)) and Energy (Reid [2016a](#)).

AIR QUALITY

The European Commission first introduced legislation on air pollution in 1996. Since then several revisions and amendments have been made. The legislation includes limit values - legally binding objectives that must be met by all Member States by the specified deadline.

The key EC Directives and programmes that relate to air quality include:

- [Air Quality Framework Directive \(1996/62/EC\)](#) sets limit values for a range of pollutants including nitrogen dioxide, fine particulate matter, lead and ozone. This was followed by four “Daughter Directives” between 1999 and 2004 that set out details of thresholds and monitoring approaches for specific pollutants.
- The [Thematic Strategy on Air Pollution](#) (2005) outlines long-term objectives for air quality standards and suggests measures for meeting them.
- [The Ambient Air Quality and Cleaner Air for Europe \(CAFE\) Directive](#) (2008/50/EC) merges previous legislation on air pollution, introduces some further emission standards and time extensions to meet the limits and a standardised methodology for assessing air quality.
- The [Industrial Emissions Directive](#) (2010/75/EU) provides a framework for regulating emissions from industrial installations.
- [A Clean Air Policy Package and Clean Air Programme for Europe](#) (2013) sets targets up to the year 2030, listing supportive measure to reduce emissions.

Implementation in Scotland

Air quality is a devolved matter (although some policies with the potential to impact on air pollution are reserved e.g. fuel duty). [The Air Quality Standards \(Scotland\) Regulations 2010](#) transpose the Ambient Air Quality Directive requirements (2008/50/EC) into Scottish legislation. These limits are identical across the UK and achievement is a mandatory requirement for Member States. A UK-wide approach for tackling air pollution has been agreed in the form of

The Air Quality Strategy for England, Scotland, Wales and Northern Ireland (first published in 1997 and revised in 2000 and 2007) (Defra [2007](#)). In 2015 the Scottish Government published its first air quality strategy (Scottish Government [2015](#)).

BIRDS AND HABITATS

There are two specific Directives that make up the 'Nature Directives'. These are:

- Council Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora – usually referred to as the '[Habitats Directive](#)'. The legislation seeks to provide protection of species and habitats that are of EU conservation concern. The Directive protects over 1000 species of animals and plants and over 200 types of habitat. The Directive also established the EU-wide Natura 2000 network of protected areas..
- Council Directive 79/409/EEC on the conservation of wild birds and amended in 2009 (2009/147/EC) – usually referred to as the '[Birds Directive](#)' provides a legal framework for the conservation of all wild bird species naturally occurring in the EU. The Directive establishes a network of Special Protection Areas (SPAs) and these are now included in the [Natura 2000](#) network of protected areas.

The European Commission are in the process of evaluating the Habitats and Birds Directives as part of their [Regulatory Fitness and Performance Programme](#).

Implementation in Scotland

The [Wildlife & Countryside Act 1981](#) implements the Birds Directive across Great Britain. The Act applies to the terrestrial environment and inshore waters (0-12 nautical miles). The 'Habitats Directive' is translated into law through the [Conservation \(Natural Habitats, &c.\) Regulations 1994](#) and further regulations apply the Directive in offshore waters. The [Nature Conservation \(Scotland\) Act 2004](#) and the [Wildlife and Natural Environment \(Scotland\) Act 2011](#) have also made changes to the Wildlife & Countryside Act 1981 as it applies in Scotland.

MARINE

The [European Marine Strategy Framework Directive](#) (MSFD) (2008/56/EC) is the primary EU legislation on marine protection. The Directive requires Member States to prepare national strategies to manage their seas to achieve Good Environmental Status (GES) by 2020.

The MSFD includes a requirement to establish a network of Marine Protected Areas (MPAs) that would include the Natura 2000 network which is designed to assure the long-term survival of Europe's most valuable and threatened species and habitats. The Natura 2000 network comprises of Special Areas of Conservation (SAC) designated by Member States under the Habitats Directive and Special Protection Areas (SPAs) under the Birds Directive.

Implementation in Scotland

The [Marine \(Scotland\) Act 2010](#) and [UK Marine & Coastal Access Act 2009](#) support the implementation of the MSFD in Scotland. The Marine (Scotland) Act provides a framework to manage competing demands on Scotland's seas. It introduces a duty to protect and enhance the marine environment and includes duties for marine planning, marine licensing, marine conservation and enforcement. The UK Marine and Coastal Access Act provides executive devolution to Scottish Ministers of the marine planning and conservation powers in the offshore region (12-200 nautical miles).

In August 2014 30 MPAs were designated under the Marine (Scotland) Act and the UK Marine and Coastal Access Act for inshore and offshore waters.

WASTE AND CIRCULAR ECONOMY

The key piece of EU waste legislation is the [Waste Framework Directive](#) (2008/98/EC). This directive includes key definitions, sets a hierarchy for how waste should be managed, introduces the 'polluter pays principle' and 'extended producer responsibility', and sets recycling targets for 2020. The Directive includes a definition of waste.

This legislation is supplemented by further EU legislation on particular sources of waste including:

- The [European Landfill Directive](#) (1999/31/EC): requires Member States to develop strategies for reducing landfilling of biodegradable wastes and sets specific reduction targets.
- The [European Packaging and Packaging Waste Directive](#) (94/62/EC). Establishes recovery and recycling targets and deadlines for EU Member States to recover and recycle packaging waste.

Further directives that relate to particular waste streams, for example vehicles and waste electrical and electronic equipment (WEEE) have also been established.

In 2012, the European Commission published a [Manifesto for a Resource Efficient Europe](#) (European Commission [2012](#)). This manifesto set out the need to move towards a circular economy: 'In a world with growing pressures on resources and the environment, the EU has no choice but to go for the transition to a resource-efficient and ultimately regenerative circular economy.' In December 2015 the European Commission adopted a Circular Economy Package that seeks to 'stimulate Europe's transition towards a circular economy which will boost global competitiveness, foster sustainable economic growth and generate new jobs' (European Commission [2015](#)).

Implementation in Scotland

Most aspects of waste are devolved. The Scottish Government frequently cite the role of EU legislation and policy on waste as a driver of domestic waste policy, in particular The European Landfill Directive and European Waste Framework Directive. Domestic waste policy also relies on the definition of waste provided in the EU law.

Scotland's National Waste Plan (Scottish Government [2003](#)) set out Scotland's approach to achieving these landfill reduction targets. Since then further efforts to limit waste being sent to landfill has been included in [The Waste \(Scotland\) Regulations 2012](#) including bans on certain materials being disposed of to landfill and a requirement on local authorities to provide a collection service for dry recyclables and food waste.

The Scottish Government adopted the waste hierarchy approach described in the European Waste Framework Directive in developing the National Waste Plan and the [Zero Waste Plan](#) (Scottish Government [2010](#)).

The EU Waste Framework Directive (2008/98/EC) is also cited as one of the main policy drivers of The Waste (Scotland) Regulations 2012. These regulations seek to increase the amount and quality of material that is recycled, provide improved recycling services to households and

businesses and create conditions that will boost business investment in recycling and materials reprocessing.

The Scottish Government also refers to the need to move towards a circular economy and in February 2016 published a circular economy strategy for Scotland (Scottish Government [2016](#)).

WATER QUALITY

The EU has developed a number of significant pieces of legislation on water quality. These include:

- The [Urban Waste Water Treatment Directive](#) (91/271/EEC) (UWWTD) aims to protect the environment from the adverse effects of discharges of untreated urban waste water from public sewers and treatment plants e.g. sewage.
- The [Water Framework Directive](#) (2000/60/EC) (WFD) provides a common framework for water management and protection in Europe. The WFD established a system for the protection and improvement of all aspects of the water environment including rivers, lakes, estuaries, coastal waters and groundwater. The Directive requires all inland and coastal waters to reach at least “good status” by 2015.
- The revised [Bathing Water Directive](#) (2006/7/EC, replacing Directive 76/160/EEC) requires the UK to monitor and assess beaches and inland sites used by large numbers of bathers (referred to as bathing waters) for certain parameters of bacteria. It includes a classification and notification system so the public are aware of the status of the bathing water.

Implementation in Scotland

EU water quality law is implemented in Scotland by a range of legislation and regulations.

Many aspects of the Water Framework Directive are implemented through the Water Environment and Water Services (Scotland) Act 2003. The [Water Environment \(River Basin Management Planning: Further Provision\) \(Scotland\) Regulations 2013](#) and [the Cross-Border River Basin Districts \(Scotland\) Directions 2014](#) support the further implementation of river basin management planning. The [Water Environment \(Controlled Activities\) \(Scotland\) Regulations 2011](#) set out Scotland’s approach to regulating activities that may impact on Scotland’s water environment, for example discharges to water, diffuse pollution and water abstraction.

The Urban Waste Water Treatment Directive (91/271/EEC) was transposed into legislation in Scotland by the [Urban Waste Water Treatment \(Scotland\) Regulations 1994](#) and amended by the [Urban Waste Water Treatment \(Scotland\) Amendment Regulations 2003](#).

The Revised Bathing Water Directive (2006/7/EC) has been transposed through the [Bathing Waters \(Scotland\) Regulations 2008](#) and [The Bathing Waters \(Sampling and Analysis\) \(Scotland\) Directions 2008](#). Further regulations in the form of [The Bathing Waters \(Scotland\) Amendment Regulations 2012](#) clarify how SEPA and Local Authorities are required to carry out their monitoring and public information duties at designated bathing waters.

POTENTIAL IMPACT OF THE UK LEAVING THE EU

The impact of the UK leaving the EU on environmental protection is likely to depend on the nature of the subsequent relationship that the UK develops with the EU.

If the UK chooses to be part of the European Economic Area (EEA) many EU environmental directives would continue to apply. Such an approach is often referred to as ‘Soft Brexit’. If the UK pursues a more complete withdrawal from EU processes, negotiating trade deals with the EU and other countries or relying on World Trade Organisation rules, EU environmental law and policy would not apply (unless part of a trade agreement with the EU). This is often referred to as ‘Hard Brexit.’ In a report on the EU Referendum and the UK Environment, Burns et al ([2016](#)) highlight the implications that each of these scenarios would have (Table 1).

Table 1: The autonomy of UK decision making under a Soft and Hard Brexit scenario

Autonomy of UK decision makers	Future scenario		
	Status Quo	Soft Brexit	Hard Brexit
Enjoy favourable access to the Single Market?	Yes	Yes	No
Contribute to the EU budget?	Yes	Yes, but at a reduced level	No
Subject to EU fisheries and farming policies?	Yes	No	No
Automatically subject to EU environmental rules?	Yes	No, but most would apply	No
Subject to EU legal enforcement processes?	Yes	No, but subject to similar EFTA/EEA enforcement processes	No
Able to shape EU rules?	Yes	No	No
Able to raise UK standards?	Yes, in general	Yes, in general	Depends on terms of trade negotiated
Able to lower UK standards?	Yes, except where EU rules apply	Yes, except where EU rules apply	Depends on terms of trade negotiated
Able to shape international policies	Remain the same	Probably decline	Probably decline

(Replicated from Burns et al 2016)

Other possible scenarios include the UK choosing to be outside the EEA but within the EFTA and negotiate separate bilateral trade agreements with the EU for accessing the EU market (IES [2016a](#), Turcan Connell [2016](#)).

UNTANGLING EU, UK AND DEVOLED ENVIRONMENTAL LEGISLATION

EU law is integrated with domestic law developed by the UK and devolved governments in a range of different ways and disentangling EU and UK environmental legislation would be complex. Professor Colin Reid of the University of Dundee specialises in environmental law and has written widely on the implications of Brexit. Reid (2016b) highlights that it is rare for EU environmental legislation to stand separately from domestic legislation and highlights the following four ways that EU provisions tends to be interwoven into domestic law:

- 1) Self-contained UK legislation that has been developed to comply with EU obligations (e.g. Pollution Prevention and Control (Scotland) Regulations 2012).
- 2) Legislation that is largely self-contained but relates to EU obligations and references EU provisions (e.g. the Environmental Assessment (Scotland) Act 2005).
- 3) Legislation that depends on an aspect of EU law to make sense (e.g. the EU Waste Directive provides a legal definition of 'waste' that domestic regulations like the Waste Management Licensing (Scotland) rely on).
- 4) Legislation that supports EU law, but without that law would not make any sense (e.g. UK regulations that support enforcement of EU law on the import and export of endangered plants and animals and where UK primary legislation relating to this issue does not exist).

Depending on the future relationship between the EU and UK, the process of extracting the UK from EU environmental legislation could be a challenge. Reid notes that:

'If Parliament simply says that all EU laws no longer have legal force, we are left with a mess. That approach would not eliminate all of the EU legacy since measures wholly embedded in UK legislation would continue unaffected. It would also leave large chunks of UK law with major holes in them which will in effect prevent them from operating and open up a legal vacuum in areas where there would be no valid legal rules at all.'

Professor Reid suggests the other options would be to

- Review domestic legislation to identify those aspects that link directly or indirectly to EU legislation and deciding whether to drop, retain or amend them and replace with domestic measures where required before Brexit day, or
- Pass a single piece of legislation that results in the continuation of the law in force on Brexit Day however it reflects EU legislation.

In evidence to the Westminster Environmental Audit Committee in October 2016 (House of Commons [2016](#)) Andrea Leadson UK Secretary of State for the Environment suggested that the UK Government anticipated that it would be possible for them to bring 'between two-thirds and three-quarters' of EU environmental law into UK law:

'As far as possible, we will be bringing all EU legislation into UK law, and at first glance it appears that will be feasible to do between two-thirds and three-quarters of legislation...roughly a quarter that cannot be brought immediately into law either because it requires technical attention or falls away, and that's the bit we will be looking at to see what steps need to be taken.'

Leadson further commented that:

‘The important point for certainty for business is that we make it clear is that nothing will change unless it has to on day one. And then, over a period of time, we will be able to repeal, amend, and strengthen laws at leisure.’

On 2 October, the Prime Minister said that a Great Repeal Bill would be introduced to Parliament, the purpose of which would be to remove from the statute book the European Communities Act 1972 and ensure all EU law currently in effect in the UK would be converted into British law (Politics Home [2016a](#)).

In relation to this Great Repeal Bill, a number of people including Grant Schapps MP have suggested that it include a sunset clause so that any EU laws not transferred within 5 years of leaving the EU would automatically be removed from UK law (Politics Home [2016b](#)).

The implications of the UK leaving the EU can be considered in the context of a number of issues:

- Environmental standards
- Enforcement
- Funding
- Policy stability
- UK influence

ENVIRONMENTAL STANDARDS

Professor Reid (2016b) highlights the influence that the EU has had on environmental protection in the UK:

‘...although undoubtedly the UK on its own would have made major steps towards environmental improvement, membership of the EU has certainly ensured that action was taken on a faster timetable and more thoroughly than would otherwise have been the case.’

As noted earlier if the UK chooses to participate in the EEA the majority of EU directives that relate to environmental protection will apply in the UK. The UK and devolved nations would be bound to fulfil the requirements of the directives and be subject to the EU enforcement mechanism provided by the Court of Justice of the European Union (CJEU). The Birds Directive, Habitats Directive and Bathing Waters Directive are not included in the list of EU environmental directives covered by the EEA. The UK and devolved nations would therefore not be under an obligation to fulfil the requirements provided by these directives or be subject to any EU legal enforcement mechanism for failure to comply.

In relation to an agreement that results in the UK participating in the EEA Burns et al (2016) suggest that:

‘On quality there are fewer risks than are associated with a complete ‘Hard Brexit’ but the prospects for habitats, birds and water quality will be dependent upon the preferences of the government of the day and the impact of lobbying....In the areas where the acquis

has not shaped policy, economic deregulation has triumphed over sustainability, suggesting that leaving the EU raises potential risks for environmental policy.'

Outside of the EU and EEA the UK and devolved governments would be free to adopt stronger or weaker environmental standards than at present, however the Institute for European Environmental Policy (IEEP [2016](#)) suggest that the freedom to 'relax and lower environmental standards' would result in 'real and uncertain environmental and health risks.'

Reid (2016b) also highlights that EU environmental legislation tends to impose specific standards and targets on Member States, in contrast to the previous domestic law that often provided broader statements or functions and suggests that:

'Although the use of fixed standards is now an accepted part of UK environmental law, it is possible that some discretion might return, allowing some room for manoeuvre when meeting the standards seems particularly difficult, expensive or disproportionate or conflicts with other policy goals.'

Burns et al do note, however that certain environmental standards that relate to the operation of the Single Market (for example on product standards) would have to be adhered to if the UK wished to trade with the EU. Commenting further on this issue Reid notes that wider trade agreements may also require certain levels of environmental standards to be met:

'...it is worth noting that even the looser trade agreements between the EU and other states...include provisions seeking high levels of environmental standards, the application of the precautionary principle and a commitment not to relax environmental laws in order to attract trade or investment..'

Outside of the EU the UK and devolved governments would continue to be covered by international commitments relating to the environment for example, to drinking water and air pollution, however Burns et al (2016) note that these don't necessarily provide the same level of protection as EU law:

'..there is still risk of lower standards as these international rules are generally weaker and harder to enforce than their EU equivalents...and in other areas there is a risk that environmental rules will be subject to deregulatory pressures which may jeopardise the gains made in environmental quality since the 1970s and potentially limit future improvements.'

Reid (2016c) also highlights that EU environmental legislation has provided a framework for environmental policy that has enabled 'room for national differences to emerge, but within limits' and that outside of the EU the approaches taken in different jurisdictions could diverge.

In the next section the briefing considers the potential implications of the UK leaving the EU on particular environmental areas where significant environmental law and policy has been developed.

Air Quality

The IEEP (2016) have stated that:

'There is no question that EU air protection legislation has over many years, and still very much continues to do so, affect measures taken in the UK, leading to air quality improvements.'

Air quality legislation is included under the EEA agreement and would therefore apply if the UK remained a member of the EEA. Outside of the EEA the UK Government and devolved nations could amend or repeal domestic legislation on air quality and would not be at risk of infraction proceedings and potential fines for failure to fulfil EU Water Quality Directive requirements. The IEEP express their concerns about the potential that the UK may do this:

‘In recent decades the UK has tended to be more cautious than many Member States about tightening air quality standards. Outside of the EU and EEA, the UK might well be inclined either to relax them or fail to improve them if the Government was free to do so..’

Birds and Habitats

The IEEP refer to the role that the Birds and Habitats Directives have played on biodiversity protection:

‘..it is clear that the nature directives have considerably increased the level of protection for biodiversity across Europe compared to the policies that were in place in most Member States prior to their adoption.’

The Birds Directive and Habitats Directive are not included in the EEA Agreement. The UK would therefore not be bound by the requirements of the Directives if it were to be part of the EEA. These directives have been transposed into domestic legislation, however the UK and devolved governments could amend or repeal this should they choose to do so. Professor Sir John Lawton president of the Institution of the Environmental Sciences (IES [2016b](#)) has expressed concerns about the risks that this may pose to species and habitats protection:

‘The EU has provided a consistent and powerful framework to protect Europe’s habitats and their plants and animals. Three Directives in particular (the Water Framework, The Birds, and the Habitats Directives), together with the Natura 2000 network have played major roles in ensuring there cannot be a ‘race to the bottom’ by individual member states keen to pursue economic growth irrespective of the environmental consequences. There are plenty of politicians in this country who would love to unpick this protective framework, and the consequences if they do, for people and wildlife, don’t bear thinking about.’

Those elements of species and habitats conservation that have been legislated for as part of the Nature Conservation (Scotland) Act 2004 and Wildlife and Natural Environment (Scotland) Act 2011 would continue to apply in Scotland unless the Government chose to amend or revoke this legislation. However depending on the details of the UK’s exit from the EU, the UK would no longer face the potential for infraction proceedings from the EU for failing to comply with the Nature Directives.

Outside of the EU the UK would rely on domestic legislation and international agreements on nature conservation – for example the Bern Convention, and Aichi biodiversity targets. The IEEP state that:

‘In the absence of the directives, the UK’s obligation under the Bern Convention would remain since it has been ratified by the UK as well as the EU. However, the EU Habitats Directive provides for substantially stronger species protection measures, particularly by virtue of EU enforcement mechanisms.’

Marine

As part of the EEA the MSFD would continue to apply and the UK would be bound by the Directive's targets. In relation to marine nature conservation the IEEP note the significance that EU legislation plays in marine conservation:

'...the Marine Strategy Framework Directive (MSFD) and the Birds and Habitats Directives are critical measures. Without the influence of the EU nature directives in particular, the development of marine protected areas in the UK would lose its most important legal driving force. It is likely that a few of the existing marine Natura 2000 sites would remain...It seems likely, however that the pressure to manage these for conservation would be significantly reduced.'

Waste

Most aspects of EU waste management law have been transposed into domestic legislation in the UK.

In the event that the UK participates in the EEA most EU waste management legislation will continue to apply. Outside of the EEA the UK Government and devolved administrations would not be bound by EU legislation and would be able to amend or repeal domestic legislation that implements EU waste law should they wish. Given the devolved nature of most aspects of waste policy, different governments within the UK could choose to adopt or develop different approaches to waste management.

The IEEP note the impact that the single market has on EU waste management law and in relation to the impact that legislation has on product quality and producer responsibility suggest that 'Access to the single market is dependent upon these requirements being implemented..' and these requirements are likely to continue if the UK seeks to be part of the single market.

On the issue of developing a circular economy the Scottish Government has already developed its own circular economy strategy and this reflects a number of areas that the EU have been exploring as part of their work on circular economy issues.

Water Quality

In their report on the consequences for the UK of a departure from the EU the IEEP highlight that EU water legislation has had a significant impact on the UK approach in recent decades:

'The UK was slow to implement EU law, but has gradually done so, resulting in a much higher quality of bathing waters and rivers and coasts with far lower pollution levels than before.'

The majority of EU legislation on water quality would continue to apply if the UK remained a member of the EEA. The Bathing Water Directive is not included within the EEA however the IEEP note that:

'While Brexit could have an impact on UK application of this directive with a number of beaches still not compliant on a broader scale, this is less likely to be the case in future than it was in the past. This is because (after much argument and much investment) the UK is now compliant on the great majority of beaches.'

Outside of the EEA the UK would not be at risk of infringement proceedings and potential fines for failure to fulfil EU Water Quality Directive requirements. As a devolved area of responsibility Scotland would be able to develop its own water quality objectives and policy – that were

potentially higher or lower than those agreed at an EU level. If Scotland and England were to pursue differing approaches this may pose some challenges that would need to be addressed in relation to cross border issues.

In relation to the WFD the IEEP have said that outside of the EEA:

‘..there could be a retreat from the tough objectives of this directive. Moreover, this scenario would undoubtedly lead to pressure to relax implementation of the Water Framework Directive (assuming its basic framework remains in EU law). This is because compliance would entail costs and there is no question that implementation will require further action by many farmers.’

Scotland

As Reid ([2016c](#)) notes, given the devolved nature of most environmental responsibilities Scotland would be free to choose whether it wishes to maintain those commitments that originate from EU law and any changes it may wish to make:

‘...it will be the Scottish Government and Parliament...that will be deciding how to use the new freedom of action that Brexit brings.’

Dr Richard Dixon, Director of Friends of the Earth Scotland has raised concerns about the implications of the UK leaving the EU for Scotland, particularly in relation Barnett spending and consequential (FoE Scotland [2016](#)):

‘There will likely be a huge drive within the UK Government to rip up laws which protect nature, prevent pollution and set standards for a clean environment. Most of EU environmental law is devolved to Holyrood so Scotland can decide to keep these protections in place but we will still feel the impact of deep cuts to budgets for managing the environment.’

In a Scottish Parliament debate on the environment, climate change and the European Union referendum on 27 October 2016 Members of the Scottish Parliament expressed a range of views on the implications of Brexit for Scotland’s environment (Scottish Parliament [2016](#)). The Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham) suggested that leaving the EU makes achieving the Scottish Government’s environmental goals more difficult:

‘Our membership of the EU has ensured progress on a range of important issues. It has enabled us to apply high standards in vital environmental protections, to the benefit of our most precious natural assets.Brexit would make it more difficult to achieve our ambitions for the environment.’

Maurice Golden MSP has urged the Scottish Government not to weaken environmental commitments:

‘..the Scottish Government should not use Brexit as an opportunity to deregulate and weaken environmental targets and legislation....The Scottish Government can seize the opportunities that Brexit gives us to go above and beyond when it comes to the environment.’

Liam McArthur MSP also suggested that regardless of the UK relationship with the EU Scotland could adopt more ambitious environmental approach:

‘In truth, there is nothing to stop the cabinet secretary taking a bolder, more ambitious path on the environment, regardless of whether we are inside or outside the EU.’

A number of concerns were raised by other Members including issues associated with enforcement, political uncertainty and cross-border implementation.

David Stewart MSP questioned the implications for enforcement:

‘The real threat from Brexit is that Europe’s checks and balances may go. Who will enforce Brussels directives post Brexit? Who will be in charge of infraction procedures?’

Mark Ruskell MSP highlighted his concerns about the political uncertainty of Scotland maintaining EU policies and commitments:

‘I welcome the cabinet secretary’s commitment...to uphold EU laws and directives, but these are early days and times change. Ministers and even Governments change...’

In the context of cross-border issues Graeme Dey MSP has questioned whether it could be a challenge for Scotland to maintain higher standards than those set by other parts of the UK:

‘Is it conceivable that a UK Government will appoint itself as overseer of environmental compliance and a consistent approach across these islands and their devolved Administrations? That is a concerning prospect. One can certainly imagine a situation in which, where Scotland’s environmental standards were higher than standards over the border, powerful lobbying forces would demand to compete on a level playing field.’

Scotland’s Minister for UK Negotiations on Scotland’s Place in Europe, Michael Russell MSP, has also suggested that Scotland can play a wider role in boosting environmental protection:

‘It is already clear to me from the discussions that I have had that the UK Government is not really interested in the issue of the environment – it is low down its list of priorities. The Scottish Government can help the UK and Europe-and, one might even say immodestly, the planet-by making sure that it takes centre stage.’

Regardless of Scotland’s constitutional future, Scottish Environment LINK have called for the Scottish Government and Scottish Parliament to ensure that environmental protection standards afforded to Scotland by European environmental law are maintained and have urged the Scottish Parliament’s Standing Council on Europe to consider sustainable development within its remit (Scottish Environment LINK [2016](#))

ENFORCEMENT

The Court of Justice of the European Union (CJEU) provides a mechanism to enforce the implementation of EU environmental law in Member States. The UK has been subject to a number of legal challenges in relation to compliance with EU environmental protection legislation. Examples include

- In 2012 the CJEU found the UK to be in breach of the Urban Waste Water Treatment Directive as a result of spillages of waste water in London. In 2015 the European Commission referred the UK to the CJEU in relation to the failure to ensure that urban waste water was adequately treated in 17 areas (Europa [2015](#)). This includes one area in Scotland - Stranraer.
- The UK failed to meet the EU’s 2010 air quality targets for nitrogen dioxide (NO₂) and this included areas in Scotland. In a court ruling the Supreme Court ruled against the UK

government and ordered them to draw up a revised national action plan to comply with legal NO₂ limits by the end of the 2015. The UK Government published this plan but environmental law group ClientEarth deemed this plan inadequate and successfully pursued a judicial review. In November 2016 the High Court ruled against the UK Government and they will need to produce a new Air Quality Plan (ClientEarth [2016a](#)).

ClientEarth have stated that the Scottish Government could face legal action for failing to tackle air pollution too (ClientEarth [2016b](#)).

- The UK, along with number of other Member States, have been the subject of legal challenges in the CJEU relating to the implementation of the Birds and Habitats Directives. In 2016 the European Commission announced its intention to take the UK to court for failing to protect harbour porpoises under the Habitats Directive (European Commission [2016](#)).

Professor Reid (2016c) highlights the impact that EU law has in the UK:

‘Where the law has EU origins, either directly or indirectly, UK courts are currently bound, to interpret it in the light of the EU provisions and the case law of the CJEU (European Communities Act 1972.’

If the UK participates in the EEA the enforcement mechanism provided by the CJEU would remain in relation to the environmental directives that are part of the EEA agreement. Reid (2016b) suggests that outside the EU there are ‘...challenging questions over how the government can be held to account over its environmental commitments.’ Reid also highlights the limitations on how long-term commitments on the environment made in UK policies can be enforced (Reid 2016c):

‘Apart from EU measures, within the UK long-term policies have tended not to be embedded in legal form, and when they have been, such as the legally binding targets under the Climate Change Acts, there is considerable uncertainty over how and by whom they can be enforced.’

FUNDING

Concerns about the implications of the UK leaving the EU for the funding of research and practical programmes of work related to the environment in Scotland have been raised by many.

In a debate in the Scottish Parliament (Scottish Parliament 2016) the Cabinet Secretary for Environment, Climate Change and Land Reform (Roseanna Cunningham) has highlighted her concerns for the funding of environment work by research institutes in Scotland:

‘...My portfolio directly supports a number of world-leading research institutes in Scotland that provide cutting-edge advances in agriculture, food and environmental research...Their research helps to inform policy decisions in Scotland and in the EU – indeed, the EU is a major funder of those institutes and it accounts for around £6 million in funding every year. The funding uncertainty is now considerable.’

Mark Ruskell MSP also noted the significant role that the EU LIFE programme has played in funding peatland work in Scotland:

‘The EU LIFE programme...has provided £42 million in matched funding to support peatland restoration over the past 20 years. Where will that support come from now,

when we need healthy peatlands more than ever for both their conservation value and their vast carbon sinks?’

Scottish Environment LINK also draw attention to the role that EU funding has had to date in providing direct support for environmental programmes (e.g. LIFE+) and highlight that the decision to leave the EU has already had an impact on planned bids that seek to deliver programmes of work on conservation in Scotland (Scottish Environment LINK 2016).

Scotland has also received significant EU funding to support work on the development of a circular economy. In February 2016 the Scottish Government announced that the European Regional Development Fund were providing £30 million to support a Circular Economy Investment Fund and Service (Scottish Government [2016](#)). A SPICe briefing published in November 2016 provides more detailed information on the value and sources of EU funding in Scotland (McIver and Wakefield, [2016](#)).

Mark Ruskell MSP also shared concerns about the implications of Brexit on Scotland’s consequential spend:

‘A post-Brexit bonfire of environmental regulations, investment, research and subsidies from Westminster will only drive bad consequential for budgets in Scotland and put our own green ambitions firmly back in the box.’

STABILITY

In the absence of an EU framework a number of authors (Reid 2016b, Burns et al 2016) highlight that environmental rules developed and agreed at a domestic level are likely to be more exposed to short term political pressures and vested interests. In contrast while EU environmental law and policy tends to take some time to be developed it tends to be maintained for a considerable periods of time and provides significant certainty. This certainty helps support the development and implementation of long-term plans that are often required to tackle significant environmental issues and also provide investment certainty where capital investment is required (Professor Colin Reid, pers comm).

UK INFLUENCE

The IES (2016a) refer to the strong role that the UK has played in contributing expertise to EU environmental policy making and note that:

‘If the UK were to exit the European Union, not only would we lose the ability to politically influence decision making in Europe, UK scientists would be less able to inform the process through formal and informal networks, to the potential detriment of both the UK and EU.’

If the UK were still covered by EU environmental directives as part of an agreement to participate in the EEA the UK, and devolved governments, would lose any influence in developing policy and legislation at an EU level and the accompanying ability to ensure that future legislation reflected any particular national interests (IEEP 2016).

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BRIEFINGS

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