Dear Gillian,

THE FLUORINATED GREENHOUSE GAS AND OZONE DEPLETING SUBSTANCES EU EXIT REGULATIONS

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a Notification of Intention to Consent which sets out the details of the UK SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this UK SI. Please note, we are yet to have sight of the final SIs and they are not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SIs are laid and advise you as to whether the final SIs are in keeping with the terms of these notifications.

The UK Government intends to lay this SI on 14 December, therefore I request that you report back to me by 12 December.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

Yours,

ROSEANNA CUNNINGHAM
THE FLUORINATED GREENHOUSE GAS AND OZONE DEPLETING SUBSTANCES EU EXIT REGULATIONS

ANNEX A

NOTIFICATION TO THE SCOTTISH PARLIAMENT

1. Name of the SI
The Fluorinated Greenhouse Gases and Ozone-Depleting Substances (EU Exit) (Miscellaneous Amendments) Regulations 2018 which relates to two separate EU regimes within the Environment, Climate Change & Land Reform (ECCLR) portfolio. This is an affirmative SI as it provides for functions currently exercised by the EU Commission of a legislative character to be exercised by a UK public authority instead, and it creates powers to legislate.¹

2. A brief explanation of law that the proposals amend
The UK SI fixes deficiencies arising from EU Exit in the separate but closely related EU Fluorinated Greenhouse Gases (F-gas) and Ozone-Depleting Substances (ODS) regimes. F-gases are very potent greenhouse gases (up to several thousand times more than CO₂), accounting for around 3% of emissions covered by the Climate Change (Scotland) Act 2009. The release of ODS has created a hole in the Earth’s ozone layer, and they are also very potent greenhouse gases. These gases are used in refrigeration, air conditioning, fire suppressants, insulation.

The UN Montreal Protocol was established to phase out ODS, and its scope was expanded in 2016 to include the phase down of F-gases. We currently meet our Montreal Protocol obligations through participation in the EU F-gas and ODS regimes, which introduce obligations for manufacturers and importers and for organisations that use and work with these gases. The EU regimes are established by directly applicable EU Regulations (which go further than the Protocol by including a larger range of F-gases, tighter controls, and a faster F-gas reduction trajectory), with separate UK-wide regulations providing enforcement measures.

3. Summary of the proposals and how these correct deficiencies
The UK will no longer be covered by the EU F-gas and ODS Regulations in a ‘no deal’ scenario, however it will still be required to meet its obligations under the UN Montreal Protocol to phase down F-gas and phase out ODS. The proposed UK SI brings both EU Regulations into UK law with changes to ensure they remain operable, which are mostly technical in nature.

¹ See section paragraph 1(2) of Schedule 7 of the European Union (Withdrawal) Act 2018.
The deficiencies that require the most significant changes relate to the EU wide F-gases and ODS quota regimes for manufacturers and importers to restrict the volume of these gases placed on the EU market, and the ODS licence requirements. In the 'no deal' scenario the UK will mirror these EU arrangements, establishing a separate UK quota for the UK market, with a phase down schedule for F-gas, a UK ODS licence and a UK reporting system. The UK SI reassigns EU Commission legislative functions to the appropriate authority, which is the Scottish Ministers within devolved areas, but exercisable by the Secretary of State with the consent of Scottish Ministers, and assigns administrative functions to the appropriate regulator. The Environment Agency will be the default appropriate regulator for the UK quota system to maintain the current UK-wide arrangements, but with the flexibility to allow the Scottish Ministers to designate the Scottish Environment Protection Agency to act in Scotland instead under any future Scottish arrangement.

4. An explanation of why the change is considered necessary
The UK continues to have obligations to phase down F-gas and phase out ODS under the Montreal Protocol, which are currently met through the UK’s participation in the EU regimes. As the proposed UK SI maintains the requirements of existing EU regimes, and the corresponding enforcement measures, it ensures the UK continues to meet the Montreal Protocol obligations regardless of EU exit.

There is one Scottish manufacturer with F-gas quota and innumerable organisations that use or work with these gases. The proposed approach ensures they continue to have obligations, enforceable by the appropriate body in Scotland. This will ensure the continued contribution towards our climate change targets.

5. Scottish Government categorisation of significance of proposals
Although the changes made in this proposed UK SI will maintain both existing regimes without any change in policy objectives, the Scottish Government considers that it falls within category B. This is because it involves the transfer of both legislative and non-legislative functions from the EU to the UK. Most of these fall within the Scottish Ministers’ and Scottish Parliament’s devolved competence, and therefore the proposed SI allows for these functions to be exercised by the Scottish Ministers and Scottish regulatory agencies.

6. Impact on devolved areas
The UK SI maintains the current UK-wide arrangements for the F-gas and ODS regimes established by EU Regulations, and confers powers respecting Scottish Ministers’ devolved competence. There is no significant impact on devolved areas.

7. Summary of stakeholder engagement/consultation
The UK Government has engaged with industry over the past two years, including trade bodies, EU F-gas quota holder and equipment manufacturers on the proposed
approach in a ‘no deal’ scenario. The Scottish Government has met with the only Scottish company with EU F-gas quota to hear its concerns about the duplicated administration burden of participating in both an EU and UK system, and will continues to engage with them.

8. A note of other impact assessments
The proposed approach replicates the current EU F-gas and ODS regimes, maintaining the existing requirements for both manufacturers of F-gas and ODS, and organisations that use or work with these gases.

The proposed approach will have an impact on manufactures because the costs of establishing the UK system to replace the EU system (quota, licences, reporting) will be recovered through charging businesses (which the UK Government estimates at around £0.5m annually across the UK). Businesses trading these gases on the UK and EU markets will need to participate in both the EU and UK systems (which the UK Government estimates will increase their administrative burdens by £62k annually across the UK). There is one Scottish company with F-gas quota, however the vast majority of Scottish stakeholders are users of F-gas and ODS, who will not see any change from this proposed approach.

9. Summary of reasons for Scottish Ministers consenting to UK legislation
The Scottish Ministers propose to consent to the UK SI to fix deficiencies in both the F-gas and ODS regimes because it confers functions returning from the EU appropriately to the Scottish Ministers where it is within their devolved competence.

We have long experience of working with the UK Government on implementing both regimes including introducing enforcement provisions via existing UK legislation. The UK SI maintains the current UK-wide arrangements to implement both regimes as the default, but ensures that the powers are appropriately conferred on the Scottish Ministers such that they can make alternative arrangements in future if desired.

10. Scottish Ministers’ regard to the guiding principles on the environment
The Scottish Ministers have had regard to their guiding principles on the environment as set out in the Climate Change Act (Scotland) 2009, as the objective of the F-gas and ODS regimes is to reduce emissions of these potent greenhouse gases. This reduction is achieved through various means, including banning some gases, phasing others out over time, prohibiting intentional releases and introducing requirements for leak checks etc. This UK SI ensures all these measures are maintained, and that the UK continues to meet its Montreal Protocol obligations.

11. Intended laying date of instruments
The UK Government intends to lay the UK SI on the 13 December 2018.
12. Does the Scottish Parliament have 28 days to scrutinise?
Yes, the Scottish Parliament has 28 days to scrutinise this instrument.

13. Information about any time dependency associated with the proposal
Both the F-gas and ODS regimes will become immediately inoperable on leaving the EU on 29 March 2019. Therefore this UK SI needs to be in force by then to ensure these regimes are maintained and the UK continues to meet its obligations under the Montreal Protocol. Companies that are currently regulated under the EU regimes need clarity on what their on-going obligations are after EU Exit in order to ensure they can take the necessary steps to comply.

14. Broader governance issues in relation to this proposal
The proposed approach seeks to maintain the current UK-wide approach to the F-gas and ODS regimes in a no deal scenario, with enforcement of the EU requirements currently shared between the Environment Agency and Scottish enforcement bodies. However the proposed approach means the Environment Agency will take over issuing of F-gas quota and ODS licences UK-wide from the EU Commission. The detailed arrangements for long term co-operation between the UK Government and the devolved administrations will be agreed through a Memorandum of Understanding. The UK SI provides flexibility for Scottish Ministers to make alternative arrangements in future if necessary, which would require secondary legislation and consultation with the other administrations.

15. Significant financial implications
The financial implications of the UK SI arise from the creation of a UK quota, licence and reporting system to mirror the EU system the UK ceases to have access to. The UK Government has estimated the annual UK wide costs for the Environment Agency to administer the new system at £500k. These costs will be recovered from businesses, but if the Scottish Ministers wanted to make alternative arrangements, there would be financial implications for the Scottish Government.

In addition to Environment Agency charges for the UK system, the UK Government estimates that businesses’ admin burden for participating in the UK system will £62k. There is currently one F-gas quota holder in Scotland who will face a proportion of these costs. Beyond this UK system there are no significant financial implications from the UK SI, as it maintains the existing EU regime requirements that organisations are already subject to: bans on certain gases in certain applications, requirements for leak checks, requirements for qualified personnel etc.