

## Introduction

The RSPB in Scotland is supported by nearly 90,000 members and campaigns on issues affecting wildlife and the natural environment. We welcome the opportunity to respond to this consultation, given the huge implications of Brexit for Scotland's natural environment: currently 80% of environmental protections in the UK stem from EU law and institutions. Furthermore, governance of environmental matters in the UK is largely devolved but many environmental issues do not respect borders. It is therefore vital that the UK Government and the devolved administrations work constructively together, in a way which respects the devolution settlements, to maintain minimum common standards at least as high as those currently in place, so as to effectively address cross-border environmental issues.

We welcome assurances from the Scottish Government that a post-brexit Scotland will maintain *at least* the same level of environmental protection as is currently afforded by EU legislation.<sup>1</sup> The EU (Withdrawal) Bill (hereafter "the Bill"), by ensuring that environmental protections are brought over into domestic law, is the first step to delivering on this promise in practical terms. We also recognise that the Bill is necessary to ensure legal certainty on 'exit day'. In particular the Bill needs to:

- Convert the entire body of European environmental law into domestic law, including fundamental principles of international and EU environmental law;
- Provide for new governance arrangements so that there is effective implementation of environmental standards, whatever the UK and Scotland's future relationship with EU institutions;
- Restrict the use of secondary legislation, before and after Brexit, and create processes for robust parliamentary scrutiny of any changes made through secondary legislation during the conversion of EU law.

## General comments on the Bill

We have a number of general concerns with the Bill, as currently drafted, which are outlined in a [briefing by Greener UK](#), a coalition of environmental NGOs, alongside our [proposed amendments to the Bill](#). Our concerns can be summarised in three main points:

1. **Environmental principles:** Many of our strongest environmental protections are underpinned by general principles of international environmental law, such as the precautionary principle and the polluter pays principle. These principles, which have proved instrumental in the effective development and application of environmental protections, are embedded in the EU treaties but are not currently articulated in domestic

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<sup>1</sup> <https://news.gov.scot/speeches-and-briefings/securing-the-interests-of-scotlands-environment-and-progress-on-climate-change-following-the-eu-referendum>

law. The Bill does not provide sufficient clarity that these principles will be converted alongside other EU law. This is critical to ensure environmental legislation, including any jointly agreed frameworks between the UK Government and devolved administrations, is applied and developed correctly in the future.

2. **Secondary legislation:** We have several concerns about the scope and scrutiny of delegated powers conferred to Ministers by the Bill, which will be discussed in our response to question 1. Additionally we are concerned about the lack of clarity regarding the status of retained EU law. The entirety of our EU-derived environmental laws should be given a status equivalent to primary legislation, so that it can only be amended or repealed by an Act of the relevant legislature and not be left vulnerable to future change.
3. **Environmental Governance:** Environmental law will only achieve desired outcomes with the support of robust institutions to ensure implementation and, when necessary, enforcement of that law. EU institutions such as the European Commission and the European Court of Justice play a central role in this process at present, undertaking monitoring, oversight, implementation and enforcement of environmental law. Current domestic governance arrangements such as judicial review, parliamentary processes and domestic environmental agencies in Scotland, and in the UK, are not equivalent to existing EU arrangements. The Secretary of State for the Environment, Food and Rural Affairs Michael Gove, has recognised the need for new environmental institutions<sup>2</sup>, and Scottish Government officials have also acknowledged in discussions that this issue must be addressed, for instance that 'it is essential that appropriate governance arrangements are introduced in order to implement, monitor, audit and enforce standards'. However, neither the UK nor the Scottish Government have proposed any tangible additional environmental governance regimes. The Bill should provide for new governance mechanisms to be introduced in all four of the UK countries so that our environmental laws are not rendered unenforceable.

## 1. The appropriateness of the powers proposed in the Bill

RSPB Scotland recognises that, given the vast amount of EU law in force in the UK, Statutory Instruments and delegated powers will be necessary to ensure legal continuity on the day of exit. We welcome the statement in the explanatory notes to the Bill that legislation cannot be considered deficient '*merely because a minister considers that EU law was flawed prior to exit*', meaning that these powers can only be used to correct deficiencies that arise as a result of our withdrawal from the EU. However, we remain concerned that the powers proposed are too broad in scope and are not sufficiently constrained to the purpose of the faithful transposition. As currently drafted, the Bill gives UK and devolved Ministers the potential to make significant and wide-ranging changes with limited parliamentary oversight.

For instance, both the explanatory notes to the Bill and the White Paper cite an example of the type of 'operational' amendment that might be necessary: '*the [current] law requires the UK to obtain an opinion from the European Commission on a given issue...the power to correct the law would allow the Government to amend UK domestic legislation to replace the reference to the Commission with a UK body, or to remove this requirement entirely.*' This

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<sup>2</sup> <https://www.gov.uk/government/speeches/the-unfrozen-moment-delivering-a-green-brexite>

example is concerning, as the removal of such a requirement would represent the loss of important monitoring and oversight mechanisms and in our view goes far beyond what might be considered a technical change. We believe it is vital that these sorts of non-technical changes are not made through the use of delegated powers conferred by the Bill and should only be made using primary legislation at a later date.

Additionally, whilst the use of delegated powers is restricted to, at most, two years after 'exit day', 'exit day' remains undefined. We acknowledge that flexibility is necessary to allow for any potential transitional arrangements, but we are equally concerned about the potentially extensive period of time during which UK and devolved Ministers may utilise these wide-ranging powers.

We therefore suggest that the Bill places the following safeguards on any delegated powers:

- Assurance that delegated powers will only be used to ensure that converted EU law operates with equivalent scope, purpose and effect; or to implement any rights or obligations arising from negotiations with the EU;
- A requirement that non-technical changes to legislation, where appropriate, are made by primary legislation only and that this should only occur if agreed, and subject to an appropriate level of scrutiny, by all four administrations;
- A guarantee that powers will lapse at the point of the UK's exit from the EU; and
- Creation of a robust 'sift and scrutinise' system so that every statutory instrument undergoes an appropriate level of scrutiny and to ensure appropriate and independent oversight of the use of delegated powers.

## **2. The approach proposed in the Bill for repatriating powers which are currently competences of the EU and the implications of this approach for the devolution settlement in Scotland**

Powers relating to most environmental matters, including agriculture and fisheries, are currently devolved. To date, these powers have been exercised in the context of the UK's membership of the EU, which has shared competence for such matters.<sup>3</sup> In light of the widely recognised importance of a coordinated transboundary approach and the maintenance of a level playing field for the effective protection of the environment, these areas are strongly governed by EU policy and legislation.

We are particularly interested in the approach proposed in the Bill for repatriating these powers relating to environmental matters and the implications of this for the devolution settlements, insofar as this relates to how the UK Government and the devolved administrations can work constructively together to secure an approach that both respects the devolution settlements and guarantees common environmental standards. This issue will therefore be dealt with in our response to question 3.

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<sup>3</sup> i.e. its shared competence for environmental matters between the EU and the Member States and applies in relation to a range of areas that includes agriculture, fisheries (with the exception of marine biological resources under the common fisheries policy which is an exclusive competence of the EU), and the environment.

### **3. Whether there is a need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment; The appropriateness of the arrangements for these suggested by the Withdrawal Bill; Alternative models for discussing, agreeing and operating any common frameworks that may be required**

The importance of common standards for the effective protection of the environment will not diminish post-brexit. Indeed, the principles justifying EU-level cooperation and regulatory alignment on environmental matters apply equally if not more strongly to intra-UK cooperation and regulatory alignment. RSPB Scotland was therefore pleased to note the commitment in the *Government's Programme for Scotland 2017 – 2018* to 'collaborate where appropriate to develop UK-wide approaches for relevant issues'. We believe that the common set of environmental standards, currently in place as part of the UK's membership of the EU, should be retained in domestic law and policy post-brexit.

The justification for retaining a coordinated, transboundary approach to environmental protections is well-evidenced. For instance, the recent 'fitness check' of the Birds and Habitats Directives clearly demonstrated the added value that this legislation provides both in terms of a 'level playing field' for economic operators and a more effective, coordinated and consistent approach for achieving nature conservation objectives. Similarly, the EU's Common Agricultural Policy currently provides a consistent and coherent policy framework across the UK that also allows a degree of flexibility, recognising that farming, nature and communities are different in different parts of the UK and face varying challenges, but that there are also many similarities across the UK's rural areas that necessitate consistency and complementarity of approach. This context will not change post-brexit.

The loss of these common standards therefore place the UK's environment and shared natural heritage in danger of significant regulatory divergence and a less coordinated approach to environmental governance. In addition, it would risk resulting in an environmentally damaging process of competitive deregulation across the UK's four countries. In order to respect the devolution settlements, it will therefore be essential for the UK and devolved governments to work closely and constructively together to agree on how to effectively embed existing EU environmental law in domestic law through the withdrawal process.

When it comes to new common frameworks post-brexit, for instance in the areas of agriculture or fisheries, it is essential that these are developed and agreed by all four nations, subject to an appropriate level of scrutiny by all four legislatures and underpinned by a clear and agreed framework of guiding principles. In particular we believe that any new common framework should:

- Be designed based on a robust and transparent assessment of the environmental impacts under a range of plausible scenarios;
- Set ambitious common standards that are at least as high as those set out in existing EU law, at the same time as retaining an appropriate degree of flexibility so as to allow implementation to be tailored to the specific environmental context in each nation;

- Prevent competitive deregulation within the UK by setting a minimum common baseline but not prevent any nation from introducing higher standards or tailoring policy to their own political, environmental and cultural context;
- Be developed alongside a new set of fair and transparent environmental funding arrangements based on objective environmental criteria and the delivery of public benefits, to replace the loss of EU funding streams and enable effective implementation;
- Include robust shared governance arrangements to replace the current set of processes by which the EU institutions ensure that all of the UK's jurisdictions are acting in accordance with their obligations under EU law. These should include clear monitoring and reporting requirements, and associated compliance and enforcement mechanisms; and
- Include shared environmental ambition to help meet the UK's national and international commitments and obligations, including the Convention on Biological Diversity and Sustainable Development Goals.

#### **4. The suitability of current inter-governmental relations structures for a post-Brexit environment, and alternative processes and structures that may improve the effectiveness of intergovernmental relations, in light of the process of EU withdrawal and the development of common frameworks**

To enable the development and agreement of common standards for the environment, as set out in our response to question 3, the four UK governments will need to agree and establish new and improved mechanisms for inter-governmental working at both Ministerial and official levels. Wider stakeholder involvement and consultation should also be included as a core part of this process.

#### **5. The mechanisms that could be put in place to ensure that the Scottish Parliament has sufficient oversight over the process of negotiating, legislating for and implementing Brexit, and of the exercise of powers conferred on Scottish and UK Ministers by the Withdrawal Bill**

The Bill does not provide sufficient clarity about the role that will be given to the Scottish Government and the Scottish Parliament in creating Statutory Instruments needed to convert EU law into Scots Law (e.g. EU regulations) or for technical changes required to current EU derived Scots law. Our current assumption is that the Scottish Government and Holyrood will, and should, be provided with a role equivalent to the one given to the UK Government and the UK Parliament.

Based on this assumption, whilst we recognise that a vast amount of legislation will need to be considered in a relatively brief amount of time, it is important that rather than leaving it to the UK Government and devolved administrations to justify the use of delegated powers, independent oversight on the use of such powers should be put in place. One such mechanism, as set out in our response to question 1, would be a 'sift and scrutinise' system to identify statutory instruments which require an enhanced level of scrutiny. For some of the

more nuanced or contentious statutory instruments identified by this mechanisms a parliamentary scrutiny committee should be created that can:

- Require a draft of the proposed SIs to be laid before the appropriate legislature;
- Require the relevant Minister to provide further evidence or explanation as to the purpose and necessity of the proposed instrument;
- Make recommendations to the relevant Minister in relation to text of draft SIs;
- Recommend that Parliament does not proceed with a draft SI.

Furthermore, the relevant Minister should be required to have regard to any recommendations made by the committee, or results of public consultation (where appropriate), before laying a revised draft SI before the relevant legislature.

A further point relating to parliamentary oversight concerns the lack of clarity in the Bill about the status of retained EU law. As mentioned in our general comments on the Bill, assurance must also be provided that once all EU law is converted, it will be given a status equivalent to primary legislation. This would mean that it can only be amended or repealed by an Act from the relevant legislature. This is vital in order to ensure that important environmental protections are not left to the whim of the executive and will not be left vulnerable to future change.

*For further information please contact:*

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