

This document relates to the UK Withdrawal from the European Union (Continuity) (Scotland) Bill (SP Bill 77) as introduced in the Scottish Parliament on 18 June 2020

UK Withdrawal from the European Union (Continuity) (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the UK Withdrawal from the European Union (Continuity) (Scotland) Bill, introduced in the Scottish Parliament on 18 June 2020.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 77–FM);
 - a Policy Memorandum (SP Bill 77–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 77–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a part of a section or schedule does not seem to require any explanation or comment, none is given.

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The Bill

5. This Bill provides for:

- the introduction of a power to enable Scottish Ministers to continue to keep devolved law in line with EU law so far as appropriate following the end of the implementation period provided for in the European Union (Withdrawal Agreement) Act 2020, which is when, under that Act, EU law will cease to apply in the United Kingdom as a consequence of the UK's withdrawal from the EU;
- the introduction of the guiding principles on the environment into Scots law; and
- the formation of Environmental Standards Scotland, and its functions and powers.

Background

6. On 1 January 1973 the UK joined the European Economic Community, now the European Union. The principal statute which gave domestic effect to EU law and gives the governments of the UK the ability to implement EU law was the European Communities Act 1972 (the "ECA").

7. On 23 June 2016, a referendum was held in the UK and Gibraltar on the question whether the UK should remain a member state of the EU. Across the UK and Gibraltar 52% of the votes were for leaving the EU, with 48% voting to remain. In Scotland, 62% of the votes were for remaining in the EU, with 38% voting to leave.

8. On 29 March 2017, the Prime Minister notified the European Council of the UK's intention to withdraw from the EU under the terms of Article 50 of the Treaty on the European Union ("the TEU") and section 1 of the European Union (Notification of Withdrawal) Act 2017. The EU (Withdrawal) Act 2018 ("EUWA") was passed on 26 June 2018 and repeals the ECA and establishes a new framework for the application of former EU law within the UK, known as 'retained EU law'. This new form of domestic law is established under the EUWA by taking a snapshot of EU law as it stands at the moment of EU exit and converting that into

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domestic law, as well as preserving laws made in the UK to implement EU obligations.

9. The EUWA also provides temporary powers to make secondary legislation to enable corrections to be made to these ‘converted’ and ‘preserved’ laws to ensure they continue to operate appropriately when the UK is no longer a member state. These powers are sometimes referred to as ‘deficiency’ powers.

10. The European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”) was passed on 23 January 2020 and gives effect to the Withdrawal Agreement that was agreed by the EU and the UK in October 2019. The Withdrawal Agreement was accordingly ratified and the United Kingdom exited the European Union on 31 January 2020 (“exit day”).

11. The Withdrawal Agreement provides for a transition period to apply from exit day until 31 December 2020. The transition period is also referred to as the implementation period. Whilst there is scope under the Withdrawal Agreement to extend the implementation period, this is currently ruled out under section 15A of the EUWA. During the implementation period, the vast majority of EU law continues to apply in the UK as though it were still a member state.

12. Therefore, despite the repeal of the ECA on exit day by the EUWA, the 2020 Act makes amendments to the EUWA to save and modify the effect of that repeal and to give effect to the continuation of EU law during the implementation period as per the Withdrawal Agreement. Directly applicable EU measures will therefore continue to apply directly in the UK during this period and the UK will continue to be required to implement EU obligations.

13. The 2020 Act also amends the EUWA to ensure that the snapshot of retained EU law is taken at the end of the implementation period (referred to in the EUWA, as amended by the 2020 Act, as “IP completion day”) as opposed to on exit day.¹ It follows therefore that EU

¹ Although, the Direct Payments to Farmers (Legislative Continuity) Act 2020, which the Scottish Parliament consented to on 16 January 2020, converted the EU legislation governing the 2020 Common Agricultural

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law as it stands in Scotland on IP completion day will become part of Scots law as retained EU law under the EUWA.

14. Retained EU law, as modified under deficiency powers so that it operates appropriately, will continue to apply in Scotland until such time as new domestic laws are made to change it. The extent to which ‘post-implementation period EU law’ will apply in the UK going forward as a matter of the UK’s international obligations, will depend on whether a future Agreement is concluded by the UK and the EU and what the terms of any such Agreement are.

The different forms of EU law and the ECA

15. The EU Treaties are the primary source of EU law and under the Treaties, the EU may adopt a number of different forms of legislation. The most common forms are EU Regulations and EU Directives but other forms include decisions, recommendations and opinions.

16. EU Regulations contain detailed legal rules and have “direct effect” in Member States. This means, in principle, they do not need to be specifically implemented domestically and can be applied based on the text of the Regulation itself. EU Regulations are automatically applied in the UK without the need for specific implementing legislation by virtue of section 2(1) of the ECA.

17. EU Directives set out a legal framework which member states have to follow but which leave discretion to member states about how to make them part of their law. Directives do not generally have direct effect and require to be implemented through domestic law, frequently using the powers provided for this purpose in section 2(2) of the ECA.

18. The EU can also adopt binding decisions. These may be addressed to a particular party or parties (e.g. to individuals or to member states), in which case it may be necessary for domestic legislation to give effect to the decision. It is also possible for a decision to have no addressee. In those circumstances, a decision may or may

Policy (CAP) direct payment schemes into domestic law at 11 pm on 31 January 2020.

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not be directly and generally applicable: it depends on the context and the particular wording of the decision.

19. The EU institutions can also adopt recommendations and opinions, which are not legally binding although they may have legal effects (e.g. in so far as domestic courts are required to take them into account in interpreting domestic legislation designed to implement them or where they may have legal effects in the interpretation of legally binding instruments).

20. EU tertiary legislation refers to when EU secondary legislation (e.g. EU Regulations and Directives) makes provision for a further power to make detailed tertiary rules to be adopted at EU level. There are two types of tertiary legislation: delegated acts and implementing acts. The power to make a delegated act is a power to supplement or amend non-essential elements of the legislative act whereas implementing acts are used where uniform conditions for implementing legally binding Union acts are needed. Tertiary legislation may take the same form as secondary legislation (i.e. regulations, directives, decisions, recommendations or opinions).

21. As noted above, the ECA is the principal statute which gives domestic effect to the various types of EU law. The two main provisions of the ECA are section 2(1) and section 2(2). The key part of section 2(1) provides that certain rights or obligations created or arising by or under the EU Treaties (i.e. those which are, in EU law, of direct application or direct effect in the member states) will apply automatically in the UK without the need for additional implementing legislation.

22. As above, other types of EU law (such as Directives) are implemented through domestic law, frequently using the powers provided for that purpose in section 2(2) ECA. The power in section 2(2)(a) can be used to implement EU obligations and the power in section 2(2)(b) can be used to deal with matters 'arising out of or related to' EU obligations.

23. As a consequence of amendments made to the EUWA by the 2020 Act, section 2(1) of the ECA will continue to apply and the powers

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in section 2(2) will remain available during the implementation period but thereafter, these provisions will cease to apply.

Retained EU law

24. As noted above, the EUWA establishes a new framework of retained EU law and this framework falls into three main categories:

- (i) EU-derived domestic legislation (e.g. domestic primary or secondary legislation which implements EU obligations);
- (ii) direct EU legislation (e.g. directly applicable EU legislation which had effect by virtue of section 2(1) of the ECA, such as EU Regulations, EU tertiary legislation and EU decisions);
- (iii) other directly effective EU law rights and obligations (this captures the remaining rights and obligations not covered by (i) and (ii)).

25. Modifications of retained EU law are also retained EU law as section 6(7) of the EUWA makes clear that “retained EU law” means (i), (ii) and (iii) above including that body of law as it is “added to or otherwise modified by or under” the EUWA or other domestic law from time to time. The effect of section 6(7) of the EUWA, however, is not that all legislative amendments to retained EU law will automatically be included under the retained EU law umbrella: this will ultimately depend on the significance of any such amendment.

26. Section 7 makes provision about the status of retained EU law and restricts the way in which categories of retained EU law within (ii) and (iii) above may be amended by primary and subordinate legislation. It is clear from section 7 that there are no restrictions on powers contained in future primary legislation.

EU Law and the Scotland Act 1998

27. Section 29(2)(d) of the Scotland Act 1998 provides that Acts of the Scottish Parliament are not law in so far as they are incompatible with EU law. Section 12(1) of the EUWA, due to be commenced at the end of the implementation period, is set to remove this competence restriction, which means it will be competent for the Scottish Parliament and the Scottish Ministers to amend retained EU law in devolved areas, subject

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to section 30A of the Scotland Act 1998 (inserted by section 12(2) of the EUWA).

28. Section 30A provides a power for a UK Minister to specify in regulations particular areas in which the Scottish Parliament may not modify, or confer powers to modify, retained EU law. Section 30A provides that any restriction applied using the power does not affect the competence of the Scottish Parliament to make any provision that it could have made immediately before IP completion day. As yet, no regulations under section 30A have been made.

Commentary on sections

Part 1 – Alignment with EU law

Section 1– Power to make provision corresponding to EU law

29. Section 1 gives the Scottish Ministers the discretionary power to continue to keep devolved law in line with EU law following ‘IP completion day’.

30. The reference to ‘IP completion day’ refers to the end of the implementation period. Whilst not defined in the Bill, the reference will have the same meaning as in the EUWA. This is by virtue of schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 (as amended) (‘ILRA’). Paragraph 37(c) of schedule 5 of the 2020 Act amends schedule 1 of ILRA to define ‘IP completion day’ by reference to section 39(1) to (5) of that Act.

31. Subsection (1)(a) gives Ministers the power, by regulations, to make provision that would correspond to provision in EU law as it has effect in EU law after the end of the implementation period. Sub-paragraphs (i) to (iv) set out the different types of EU law that provision may be made in relation to, namely EU regulations, EU tertiary legislation, EU decisions and EU directives. These terms are defined in section 8 and refer to the versions applicable in the rest of the EU (as opposed to those which form part of domestic law as retained EU law) and as they have effect in EU law after IP completion day. See

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paragraphs 51-56 for information on the definitions contained in section 8.

32. There are two aspects to the power in subsection (1)(a). In addition to enabling the Scottish Ministers to make provision corresponding to EU law as it develops after the implementation period (sub-paragraphs (i), (ii) and (iii)), the power also enables Scottish Ministers to make provision in relation to existing EU laws, which have been implemented or have effect domestically already (sub-paragraph (iv)).

33. Subsection (1)(b) mirrors the power in section 2(2)(b) of the ECA. This is the power which can be used to deal with matters 'arising out of or related to' EU obligations and permits implementing provision which goes beyond the minimum necessary to implement an EU obligation.

34. Subsection (2) clarifies the extent of Ministers' ability to adapt provision made under subsection (1)(a)(i), (ii) and (iii) so that it operates effectively in Scots law despite the UK no longer being a member state of the EU. The subsection provides a list of the adaptations that may have to be made by Ministers.

35. Subsection (3) sets out some of the things that can be done using the power under subsection (1)(a)(i), (ii) and (iii), such as providing for EU functions to be carried out by public authorities in Scotland.

36. Subsection (4) sets out some of the things that can be done using the power under subsection (1)(a)(iv) to amend existing EU law implementation. In such cases where an EU function is already being carried out by a public authority in Scotland, the power will enable that function to be further sub-delegated or conferred on a different public authority.

37. Subsection (5) provides that, where a Scottish public authority has been given a function by virtue of regulations made under subsection (1), the Scottish Ministers may by regulations enable it to charge fees or other charges in connection with carrying out that function. It contains an illustrative list of some of the things that this power may do. In particular it may set the amounts of fees or charges or say how they are to be determined, for example by a formula. It may also provide for how

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the money is collected and spent. Subsection (5)(c) provides that regulations made under this power can sub-delegate this power to another public authority that has the function.

38. Where regulations do provide for such sub-delegation, the use of this power will be subject to the affirmative procedure by virtue of section 4(2)(e). The exercise of the sub-delegated power will be subject to whatever arrangements for scrutiny are set out in the relevant provisions. Where this power is used to impose a new fee or increase a fee or charge then it is subject to the affirmative procedure by virtue of section 4(2)(c), except where regulations simply alter a fee or charge to reflect changes in the value of money. In those circumstances the regulations will be subject to the negative procedure.

39. Subsection (6) establishes that the power may be used to make any kind of provision that could be made by an Act of the Scottish Parliament. This means, for example, that the power may be used to modify retained EU law in so far as that is otherwise within the scope of the power by virtue of subsection (1) (and subject to any restrictions which may be imposed by section 30A of the Scotland Act (introduced by section 12(2) of the EUWA)).

Section 2 – Limitations on the section 1(1) power

40. Section 2 sets out limits on the use of the power, which are that it cannot be used to:

- impose or increase taxation, make retrospective provision or create certain types of criminal offence;
- provide for the establishment of a Scottish public authority;
- remove protections relating to judicial independence or make provision contrary to section 1 of the Judiciary and Courts (Scotland) Act 2008;
- confer on public authorities in Scotland functions that are inconsistent with the general objects and purposes of the authority; or
- modify the Scotland Act 1998 (or the protected subject-matters listed in section 31(5) of that Act), the Equality Act 2006 or the Equality Act 2010. Subsection (2) qualifies the

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limitation on removal of judicial protection or modification of equalities legislation if alternative provision is made in the regulations that is equivalent to the protection being removed or modified.

Section 3 – Duration of the section 1(1) power

41. Section 3 provides that the power under section 1(1) expires and is no longer available to the Scottish Ministers 10 years after it comes into force. The Scottish Ministers may, by regulations subject to the affirmative procedure, on a rolling basis extend that 10-year period by periods of up to five years.

42. Subsection (3) clarifies that although the power under section 1 expires, the regulations made under the power do not expire.

Section 4 – Scrutiny of regulations under section 1(1)

43. Subsections (1) and (2) set out the circumstances in which regulations made under section 1(1) powers are subject to the affirmative procedure of the Scottish Parliament (affirmative procedure means the regulations cannot be made unless a draft of them has been laid before and approved by the Scottish Parliament). These are when an instrument under section 1(1):

- abolishes a function of an EU entity or public authority in a member State without providing for an equivalent function to be exercisable by any person, or provides for any function of an EU entity or public authority in a member State to be exercisable instead by a Scottish public authority or (as the case may be) to be conferred instead on another Scottish public authority or person,
- imposes, or otherwise relates to, a fee or charge in respect of a function exercisable by a public authority in the United Kingdom (except where the alteration of the fee reflects changes in the value of money),
- creates, or widens the scope of, a criminal offence, or
- creates or amends a power to legislate.

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44. Subsection (3) sets out that any instruments made under these powers that do not fall into the categories in subsection (2) are subject to the negative procedure. Negative procedure means the regulations can be made but are subject to subsequent annulment by the Parliament. However, subsection (3) also permits discretion for affirmative procedure to be applied as opposed to negative procedure, meaning that an instrument which would normally be subject to negative procedure could benefit from additional scrutiny by the Parliament where appropriate.

Section 5 – Explanatory statements for regulations under section 1(1)

Section 6 – Explanatory statements: good reasons, equalities etc.

Section 7 – Reports relating to the exercise of the section 1(1) power

45. Sections 5 and 6 require all instruments made under these powers to be accompanied by written explanatory statements, setting out certain matters relating to the making of the instrument:

- An explanation of the instrument and why Scottish Ministers consider there are good reasons for making it, for example to ensure the highest possible food safety standards are maintained, the pre-IP completion day law which is relevant to it, and its effect on retained EU law;
- Whether it modifies any provision of equalities legislation and if so, what its effect is;
- That the Scottish Ministers have had regard to their duties under equalities legislation;
- The instrument's effect on rights and duties relating to employment and health and safety, and matters relating to consumer protection (in so far as it would be within devolved competence for an instrument to have an effect on those matters).

46. Section 5(4) requires the Scottish Ministers, if they cannot make such a statement, to set out the reasons why.

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47. Section 5(5) requires the Scottish Ministers to arrange for the publication of these statements.

48. Section 5(6) provides that the Scottish Ministers do not have to comply separately with the requirement to make an explanatory statement if they have previously done so for an equivalent instrument (for example, where a draft has been withdrawn and re-laid with minor modifications).

49. Paragraph 16 of schedule 8 of the EUWA imposes a similar requirement for certain statements to be made (on or after IP completion day) in relation to Scottish statutory instruments (SSIs) which amend or revoke subordinate legislation made under section 2(2) of the ECA. The requirement applies to SSIs or draft instruments to be laid before the Scottish Parliament and it applies whether the SSI is made under powers conferred before, on or after IP completion day but it does not apply to powers under the EUWA itself. The duty falls on the Scottish Ministers or other authority making the instrument. In the event that the Scottish Ministers are required to make an explanatory statement under both section 6 of this Bill and under paragraph 16 of schedule 8 of the EUWA, it would be possible for the Scottish Ministers to make a single statement.

50. Section 7(1) requires Scottish Ministers to prepare and lay before the Scottish Parliament a report explaining how the section 1(1) power has been used during the reporting period, which is defined in subsection (2) as one year from the day which section 1(1) comes into force and further one year periods from that date onwards.

Section 8 – Interpretation of Part 1

51. Section 8(1) defines several of the terms in Part 1 of the Bill.

52. Subsection (2) makes clear that the power in section 1 does not require Ministers to implement the whole of an EU Directive or make provision corresponding to the whole of an EU Regulation.

53. In terms of the interpretation of provision made under the power in section 1 of the Bill, whilst there is no express provision about this on the

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face of the Bill, it is also relevant to note section 6 of the EUWA. Section 6² makes provision about the relationship between the Court of Justice of the European Union³ ('the CJEU') and domestic courts and tribunals at the end of the implementation period.

54. Section 6(1) of the EUWA makes clear that CJEU judgments passed after the end of the implementation period are not binding on domestic courts in the UK. Section 6(2) of the EUWA establishes that, despite section 6(1), domestic courts may have regard to CJEU judgments delivered after the end of the implementation period in so far as any such judgments are relevant to any matter before the court or tribunal. In so far as a court may need to interpret provisions implemented under section 1 of this Bill, it is considered likely to be relevant for a court to have regard to any case law of the CJEU interpreting the corresponding EU legislation.

55. Section 6 of the EUWA also makes provision regarding the interpretation and application of retained EU law. As a general proposition, section 6(3) makes clear that UK domestic courts remain bound by judgments of the CJEU and domestic courts passed before IP completion day ('retained EU case law'), albeit the Supreme Court and the High Court of Justiciary in Scotland may choose to depart from such CJEU case law. This aspect of section 6 could potentially be relevant in so far as the power under section 1 is used to modify retained EU law.

56. The 2020 Act introduced amendments to section 6 of the EUWA to confer a new power on UK Ministers to make regulations providing for circumstances in which lower courts (to be specified under the power) may also not be bound by such retained EU case law. The regulations may also set the test that is to apply in deciding whether to depart from

² <http://www.legislation.gov.uk/ukpga/2018/16/section/6>

³ The CJEU has jurisdiction to rule on the interpretation and application of the treaties. In particular, the Court has jurisdiction to rule on challenges to the validity of EU acts, in infraction proceedings brought by the Commission against member states and on references from national courts concerning the interpretation of EU acts. The Court is made up of two subcourts: the General Court and the Court of Justice (which is sometimes called the ECJ).

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such case law. Depending on how the new power in section 6 is utilised, the resulting regulations could potentially have implications for the interpretation of provision made under section 1 of this Bill.

Part 2 – Environment

Chapter 1 – Environmental principles

57. The Bill confers on the Scottish Ministers functions relating to environmental principles, and creates duties on Scottish Ministers and other bodies. It replaces the effect of these principles on European law and policy in Scottish domestic legislation, in the preparation of environmental policy and development of environmental regulation in Scotland, following EU exit.

Section 9 - The guiding principles on the environment

58. Section 9 of the Bill establishes in domestic law guiding principles on the environment which are equivalent to EU environmental principles established under EU law. The four guiding principles are the precautionary principle, the principle that preventative action should be taken, the principle that environmental damage should be rectified at source, and the principle that polluter should pay. The four EU environmental principles underpin the development of EU environmental policy, and are commonly defined as:

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

59. Subsections (2) and (3) set out how the principles are derived from the equivalent principles provided for in article 191(2) of the Treaty on the Functioning of the European Union. When the Scottish Ministers

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prepare guidance under section 13, they are to have regard to the interpretation of those equivalent principles by the CJEU from time to time.

60. Subsections (4) to (7) allow the Scottish Ministers to amend, add, further define or remove environmental principles by regulations. The four guiding principles as set out in the Bill may be amended, removed or further defined where that is necessary to ensure they continue to correspond to the equivalent EU principles, as they form part of EU law. Any new principle that is introduced in addition to the principles derived from the equivalent principles provided for in Article 191(2) of the Treaty on the Functioning of the European Union may be amended or altered by regulations without limitation. Regulations will be subject to affirmative parliamentary procedure and before laying must have gone through appropriate consultation with persons or bodies as stated within the Bill.

Section 10 - Ministers' duties to have regard to the guiding principles

61. Section 10 of the Bill imposes on the Scottish Ministers and Ministers of the Crown, as far as they are acting with respect to Scotland, a duty to have regard to the four guiding environmental principles when developing policies, including proposals for legislation. A Minister of the Crown would be required to consider the guiding environmental principles or to have them in view when developing policy for Scotland. The Scottish Parliament has competence to impose a requirement on both the Scottish Ministers and Ministers of the Crown to have regard to the guiding environmental principles as the conferral has a devolved purpose, environmental protection, and related effect. The duty, when read with section 12, will apply to policy development, including proposals for legislation, with the purpose of contributing to the protection and improvement of the environment and sustainable development. Exempt policy areas of national defence or civil emergency and finance or budgets are listed in subsection (3). Subsections (4) and (5) provide for Scottish Ministers to make regulations, subject to the negative procedure, to disapply the duty to additional matters or circumstances.

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Section 11 - Other authorities' duty to have regard to the guiding principles

62. Section 11 ensures that the guiding principles have effect on all decisions of public authorities in Scotland, other than reserved bodies, with the potential for significant impacts on the environment. It provides that where these public authorities are responsible authorities in terms of the Environmental Assessment (Scotland) Act 2005, they must have regard to the principles when doing anything in respect of which the duty under section 1 of that Act applies. That requires responsible authorities to carry out environmental assessments under that Act when preparing certain plans or programmes. Subsection (2) defines "responsible authority" in line with the 2005 Act (see section 2 of that Act), and excludes the effect of this section on the Scottish Ministers and Ministers of the Crown because the duty placed on the Scottish Ministers and Ministers of the Crown by section 10 applies to developing policy, which is wider than the circumstances to which the duty under section 1 of the 2005 Act applies.

Section 12 - Purpose of duties under sections 10 and 11

63. Section 12 sets out that the purpose of the duties established in sections 10 and 11 is to protect and improve the environment and contribute to sustainable development.

64. Subsection (2) provides a definition of the environment for the purposes of subsection (1).

Section 13 - Guidance

65. Section 13 requires the Scottish Ministers to publish guidance on the four guiding principles and the duties in sections 10 and 11. Subsection (2) sets out content that may be in the guidance, including provision about the interpretation of the duties, how the principles relate to each other, and how the duties relate to other duties relating to the environment (including the duties under the Environmental Assessment (Scotland) Act 2005). The guidance will support the interpretation and implementation of the principles duty by Scottish Ministers and responsible authorities. It is intended to set out how the Scottish Ministers and other public bodies can demonstrate their consideration of

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the guiding principles through the Environmental Assessment process and is intended to provide advice and case studies for policy makers.

66. Subsection (3) places an obligation on persons subject to the duties to have regard to the guiding principles to have regard to the guidance.

Section 14 - Procedure for publication of guidance

67. Section 14 sets out the procedure for preparation of guidance, placing requirements on the Scottish Ministers to consult on the guidance, and to lay it before the Scottish Parliament prior to publication. Subsection (3) sets out the requirement for the Scottish Ministers to consult relevant public authorities or other appropriate persons who are subject to the principles duty prior to laying the guidance. Subsection (4) sets out that the Scottish Ministers must report on the outcome of the consultation when presenting the guidance to the Parliament. Subsections (5) and (6) provide 40 days, not counting periods of recess or dissolution for more than four days, for Parliament to resolve that the guidance should not be published.

Chapter 2 – Environmental governance

68. This Chapter establishes a new Scottish public body, Environmental Standards Scotland, and gives it a range of functions and powers. These powers and functions enable Environmental Standards Scotland to monitor and secure compliance by public authorities in Scotland, other than reserved bodies, with environmental law, and to improve the effectiveness of environmental law and of its implementation and application. It seeks to maintain a system of environmental governance equivalent to that provided by the institutions of the European Union, adapted as appropriate to a domestic function, following the end of the implementation period following the UK's exit from the EU. During the implementation period, the EU institutions maintain their oversight of the implementation of EU environmental law in Scotland.

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Establishment of Environmental Standards Scotland

Section 15 - Environmental Standards Scotland

69. Section 15 provides for the establishment of a new public body called Environmental Standards Scotland, with further provision relating to the structure, membership and governance of the body set out in schedule 1.

Functions of Environmental Standards Scotland

Section 16 - Functions

70. Section 16 sets out the functions of Environmental Standards Scotland.

71. Subsection (1)(a) confers on Environmental Standards Scotland the function of monitoring public authorities' compliance with environmental law, the effectiveness of environmental law, and how it is implemented and applied.

72. Subsection (1)(b) confers on Environmental Standards Scotland the function of investigating any question of whether a public authority is failing (or has failed) to comply with environmental law, as well as any question about the effectiveness of environmental law or whether it is (or has been) implemented or applied effectively. Environmental Standards Scotland can investigate on its own initiative or in response to information from another person, who could be, for example, a member of the public, a civic society group, a business or a public body.

73. Subsection (1)(c) allows for Environmental Standards Scotland to take appropriate action to secure a public authority's compliance with environmental law, and to secure improvement in the effectiveness of environmental law or in how it is implemented or applied.

74. Subsection (1)(d) provides that Environmental Standards Scotland may have additional functions conferred on it by this or any other enactment.

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75. Subsection (2) provides for a range of supporting functions in exercise of the functions at subsection (1).

76. Subsection (2)(a) and (b) provides for Environmental Standards Scotland to carry out, commission or support any research, as well as seek any independent and expert advice, it considers appropriate. Subsection (2)(c) and (d) also enables Environmental Standards Scotland to make recommendations on any matter relevant to its functions as well as consider, assess and review data on the quality of Scotland's environment.

77. Subsection (2)(e) and (f) provides that Environmental Standards Scotland may also keep under review the implementation of any international obligation of the United Kingdom relating to environmental protection as well as have regard to developments in, and information on, the effectiveness of international environmental protection legislation. (International environmental protection legislation is defined, in section 41(1), to mean legislation in countries other than Scotland, and legislation made by international organisations, that is mainly concerned with environmental protection. The European Union is one example of an international organisation with a legislative function). This will allow Environmental Standards Scotland to make comparisons with the effectiveness of environmental law in other countries.

78. Subsection (2)(g) provides for Environmental Standards Scotland to collaborate with any other environmental governance body in the UK (as defined by section 41(1)), including the Office for Environmental Protection (an environmental governance body being established by the Environment Bill⁴), or such other persons as it considers appropriate. Other persons could include relevant international bodies, such as the European Commission. This will allow joint working on policy effectiveness, and sharing of experience and best practice.

⁴ The Environment Bill received its second reading in the House of Commons on 26 February 2020. A copy of the Bill is published on the UK Parliament's website, which can be accessed via this [web link](#)).

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79. Subsection (2)(h) allows for Environmental Standards Scotland to request information from public authorities regarding the exercise of their functions under environmental law. This may, for example, be for monitoring or investigatory reasons.

80. Subsection (3) sets out that, when exercising its functions, Environmental Standards Scotland must act objectively, impartially, proportionately and transparently.

Section 17 - Power to modify functions.

81. Section 17 enables the Scottish Ministers, by regulations, to modify the functions of Environmental Standards Scotland in response to requirements set out in agreements on the future relationship between the UK and EU. This will ensure that Scotland is able to achieve and demonstrate compliance with the terms of such agreements without the need for further primary legislation.

82. Subsection (1) sets out the circumstances under which this regulation-making power has effect, that is for the purpose of implementing international obligations arising out of a future agreement or arrangement between the UK and the EU.

83. Subsections (2) to (5) set out further conditions for this regulation-making power, including that the Scottish Ministers are required to consult with Environmental Standards Scotland and any other persons they consider appropriate. Any regulations made under this section are subject to the affirmative procedure.

Section 18 - Duty to prepare and publish strategy on exercise of functions

84. Section 18 places a duty on Environmental Standards Scotland to prepare and publish a strategy on the exercise of its functions, and to exercise its functions in accordance with that strategy. Further provision on the strategy is set out in schedule 2.

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Section 19 - Co-operation duties of public authorities and Environmental Standards Scotland

85. Section 19 sets obligations on public authorities to co-operate with Environmental Standards Scotland. This is to ensure that Environmental Standards Scotland is able to carry out its functions, and enable public authorities and Environmental Standards Scotland to resolve matters by agreement wherever possible.

86. Subsection (1) requires public authorities to provide reasonable assistance following requests made by Environmental Standards Scotland in connection with the exercise of its functions, including the provision of information.

87. Subsection (2) requires public authorities to make all reasonable efforts to resolve any matter with Environmental Standards Scotland concerning a failure to comply with environmental law, a failure to make effective environmental law or a failure to implement or apply it effectively. Public authorities are further required to reach agreement with Environmental Standards Scotland on any remedial action needed to be taken by the authority for the purpose of environmental protection.

88. Subsection (3) places a duty on Environmental Standards Scotland to consult the Office for Environmental Protection, or any equivalent environmental governance body in Wales or Northern Ireland, where Environmental Standards Scotland considers that the exercising of its functions may be relevant to the exercise of that body's functions (for example, where a matter has a cross-border impact). The Environment Bill likewise places a duty on the Office for Environmental Protection to consult devolved environmental governance bodies. The intention is that this duty will be placed symmetrically on all environmental governance bodies in the UK. This duty to consult stands alongside Environmental Standards Scotland's power to collaborate with those bodies as set out in section 16(2)(g).

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Information notices

Section 20 - Power to require information

89. Section 20 gives powers to Environmental Standards Scotland to require information from a public authority. It is expected that, in the vast majority of instances, information will be supplied by public authorities under the general co-operation duty at section 19. However, this power enables Environmental Standards Scotland to require the provision of information in the unusual event that a public authority is for some reason not willingly providing it.

90. Section 20 therefore provides that, for the purpose of fulfilling its functions, Environmental Standards Scotland may issue a written 'information notice' to a public authority requiring it to provide such information as Environmental Standards Scotland reasonably requires. Subsection (2) sets out the details to be specified within the information notice. This will allow a formal record to be created between the public authority and Environmental Standards Scotland. Subsection (3) allows Environmental Standards Scotland to withdraw an information notice by writing to the public authority to whom the information notice was issued, for example if it decided that no further investigation of the particular matter was necessary. Subsection (4) defines 'information' for the purposes of section 20.

Section 21 - Failure to comply with an information notice

91. Section 21 provides for the enforcement of information notices. It is expected that this step will be taken extremely rarely. However, it is a necessary underpinning of Environmental Standards Scotland's functions.

92. This section allows Environmental Standards Scotland to report to the Court of Session any case where a public authority fails, without reasonable excuse, to comply with an information notice. Following receipt of such a report, and consideration of any evidence or representations on the matter, the Court may make an order for enforcement or take the matter forward as if it were a contempt of the Court, or both.

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Improvement reports and improvement plans

Section 22 - Improvement report

93. Section 22 sets out the power for Environmental Standards Scotland to prepare an improvement report in respect of failures to comply with environmental law, to make effective environmental law or to implement or apply environmental law effectively. This power is generally available to Environmental Standards Scotland for addressing matters of genuine strategic importance. The co-operation duty on public authorities at section 19, coupled with the requirement on Environmental Standards Scotland at paragraph 1(1)(g) of schedule 2 to set out how it intends to resolve issues through agreement, are intended to ensure that most matters that come to the attention of Environmental Standards Scotland are resolved without any formal exercise of its powers.

94. The power to prepare an improvement report is one of the three enforcement powers provided to Environmental Standards Scotland with respect to compliance with, and effectiveness of, environmental law. The power to prepare an improvement report should not be used where exercise of the compliance notice power under section 27 would be more effective. This will mean that the compliance notice is used in preference to the improvement report for matters relating to a public authority's exercise of its regulatory functions (as defined by section 41(1)). Environment Standards Scotland is also given the power to apply for judicial review of a public authority's conduct or intervene in an existing case, in situations where there are serious failures of compliance with the law creating serious environmental harm or risk of harm.

95. Subsection (1) gives Environmental Standards Scotland the power to prepare an improvement report if it considers that a public authority has failed to comply with environmental law, make effective environmental law or implement or apply environmental law effectively when carrying out its functions. Examples could be a strategic failure to take an action required by environmental law, such as banning a practice or substance; that an environmental duty on public bodies generally is specified in such a way that it is not achieving its goals; or that a regulatory regime is being implemented in a way that is ineffective in reaching its goals. The expectation is that improvement reports will be

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prepared for a broad area of environmental policy, so identified failures could span all number of these examples.

96. Subsection (2) allows Environmental Standards Scotland to prepare an improvement report if the combined effect of two or more public authorities constitutes a systemic failure when exercising their functions to comply with environmental law, make effective environmental law or implement or apply environmental law effectively. This might, for example, cover the circumstance where many public bodies are failing to implement a duty, or carrying out a function in a way that systemically fails to take account of an aspect of environmental law.

97. Subsection (3) requires Environmental Standards Scotland to be satisfied that any failure arising out of a public authority carrying out its regulatory functions could not be addressed in a more effective manner by issuing a compliance notice under section 27(1).

98. This is to ensure that the compliance notice route is preferred for regulatory practice issues, such as the conditions that a regulator is placing on a class of permit, although it would be covered by subsection (1), leaving the improvement notice power for more strategic issues.

99. Subsection (4) explains what an improvement report is. It is a report that sets out the details of the alleged failure and recommends measures that the public authority should take—

- to comply with environmental law, or
- to improve the effectiveness of environmental law, or how it is applied.

Section 23 - Restrictions on preparing an improvement report

100. Section 23 provides that Environmental Standards Scotland may not prepare an improvement report in respect of certain failures to comply with environmental law. Firstly, it may not prepare a report in respect of a failure arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case. Secondly, it may not prepare a report in respect of a failure arising out of particular conduct which has been the subject of a

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compliance notice that has not been subsequently withdrawn. This would ensure that the same failure was not subject to dual processes. The potential to withdraw the compliance notice and switch to an improvement report process covers the instance where Environmental Standards Scotland subsequently discovers that a failure is more systematic or widespread than it initially considered. For example, it could initially be considered that a public body was wrongly exercising a regulatory function, leading to a compliance notice, and subsequently be discovered that the problem was systematic (for example reflected in guidance and funding decisions), or widespread across public bodies. In that case, Environmental Standards Scotland might decide to withdraw the compliance notice and prepare an improvement report covering the wider, systemic issues.

Section 24 - Content of an improvement report

101. Section 24 sets out the content that an improvement report must contain.

102. Paragraph (a) requires the report to set out the grounds for preparing it. This includes details of the alleged conduct and circumstances that have led Environmental Standards Scotland to consider that a public authority has failed – or that two or more authorities have collectively failed – to comply with environmental law, to make effective environmental law or to implement or apply it effectively.

103. Paragraphs (b) to (d) require the report to set out Environmental Standards Scotland's reasons for reaching its conclusions, including details of the relevant environmental law and any other information which it took into account during its decision-making, as well as the impact of the failure (e.g. any environmental harm or risk of environmental harm, or any missed opportunity to make improvements in environmental quality). It must also propose a timescale for the Scottish Ministers or any other public authority to take forward the recommendations.

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Section 25 - Improvement report: procedural requirements

104. Section 25 requires Environmental Standards Scotland to send a copy of an improvement report to the Scottish Ministers, to lay a copy before the Scottish Parliament and to publish the report.

Section 26 - Improvement plan

105. Section 26 sets out the obligation and procedure for the Scottish Ministers to prepare an improvement plan in response to Environmental Standards Scotland laying an improvement report before the Scottish Parliament in accordance with section 25.

106. Subsection (1) establishes the requirement on Scottish Ministers to prepare an improvement plan in response to an improvement report. The obligation to prepare an improvement plan always falls on the Scottish Ministers, even if the improvement report concerns a failure that is attributable to another public authority.

107. Subsection (2) provides for the details of the improvement plan, which must include information on what the Scottish Ministers will do in response to the recommendations in the improvement report. This should include, the proposed timescale to implement the recommendations and the arrangements that will be made to review and report on progress in the implementation of the recommendations. However, if the Scottish Ministers do not intend to implement the recommendations in the improvement report (either in full or in part), the reasons for this must be set out in the improvement plan.

108. Subsection (3) states that the Scottish Ministers must lay a copy of the improvement plan before the Scottish Parliament within a set time period from the date the improvement report was laid: six months, or nine months if the Scottish Ministers consider it necessary to consult other persons (or the general public) about the plan.

109. Subsection (4) requires the Scottish Ministers to provide the Parliament with details of any consultation carried out under subsection (3) when laying an improvement plan. The Scottish Ministers must provide a summary of any views expressed in response to the

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consultation and provide further detail of how any views have been taken into account. A statement must also be provided confirming if no views were expressed or if no account has been taken of views expressed.

110. Subsections (5) and (6) require the Scottish Ministers to review and revise the improvement plan laid before the Parliament under subsection (3) if the Scottish Parliament has within 40 days resolved not to approve the plan. The Scottish Ministers must lay a copy of the revised improvement plan within three months of the date on which the Parliament resolved not to approve the plan. This process of revision and resubmission continues until a plan is accepted by the Parliament.

111. Once the Parliament has approved an improvement plan, subsection (7) requires the Scottish Ministers to publish the plan.

112. Subsection (8) provides that no account is to be taken of any period during which the Parliament is dissolved or in recess for more than 4 days when calculating the 40-day period mentioned in subsection (5).

Compliance notices

Section 27 - Compliance notice

113. Section 27 sets out the circumstances in which Environmental Standards Scotland may issue compliance notices to public authorities. The compliance notice process is designed to remedy failures by public authorities to comply with environmental law when exercising their regulatory functions (as defined by section 41(1)). There are two conditions that Environmental Standards Scotland must consider to be met before it may issue a compliance notice. The first condition in subsection (1) is that, in exercising its regulatory functions, a public authority is failing to comply with environmental law, or has failed to comply with environmental law and it is likely that the failure will be repeated or be continued. The second condition in subsection (1) is that the failure has caused, is causing or is at risk of causing environmental harm.

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114. Subsection (2) defines a compliance notice as a notice requiring the public authority to whom it is issued to take the steps set out in the notice in order to address its failure to comply with environmental law.

Section 28 - Restrictions on issuing a compliance notice

115. Section 28 provides that Environmental Standards Scotland may not issue a compliance notice in respect of certain failures to comply with environmental law. Firstly, it may not issue a notice in respect of a failure arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case. This restriction ensures that compliance notices are not used as a means to review individual regulatory decisions or as a substitute appeal process. Secondly, it may not issue a notice in respect of a failure arising out of particular conduct that has already been the subject of an improvement report. This would cover the instance where the failure had already been identified as a systemic issue, either across a range of public bodies, or structurally in the funding or guidance given to the body. Any compliance notice issued in breach of either of these restrictions will not have any effect.

Section 29 - Content of a compliance notice

116. Section 29 sets out the required contents of a compliance notice. It must contain a statement of the grounds for issuing the notice, specifically: the regulatory function of the public authority to which the alleged failure to comply with environmental law relates; the relevant provision of environmental law, and the alleged conduct that has led Environmental Standards Scotland to conclude that the public authority is failing to comply with environmental law or has failed to comply with environmental law and the failure is likely to be repeated or continue. In addition, Environmental Standards Scotland must include in the notice: its reasons for reaching its conclusion; information on the environmental harm or risk of environmental harm being caused, or having been caused, by the alleged failure, and the steps that the public authority must take to address its failure to comply with environmental law.

117. A compliance notice must also contain the following details: the date of issue of the notice; the timescales within which the required steps are to be taken (not less than 28 days from the date on which the

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notice is issued, meaning that the steps cannot be required to be taken before expiry of the 21-day appeal period specified in section 32(2)(a)); information about the person to whom, and as to how and by when, any representations about the notice may be made; information regarding the right to appeal, including timescales for this as well as an explanation of the consequences of the public authority failing to comply with the requirements of the notice.

Section 30 - Variation of a compliance notice

118. Section 30 makes provision for Environmental Standards Scotland to vary a compliance notice by extending the compliance period referred to in section 29(1)(d). A compliance notice may be varied by Environmental Standards Scotland at any time before expiry of the compliance period by writing to the public authority to whom the compliance notice was issued. The variation of the compliance notice does not affect the date of its issue for the purpose of section 32(2)(a) (which imposes a 21-day time limit on appealing against a compliance notice).

Section 31 - Withdrawal of a compliance notice

119. Section 31 allows for Environmental Standards Scotland to withdraw a compliance notice at any time before completion of the steps that are to be taken to comply with the requirements of the notice by giving notice in writing to that effect to the public authority to whom the compliance notice was issued.

Section 32 - Appeal against a compliance notice

120. Section 32 provides for appeal to a sheriff against a compliance notice. Subsection (1) sets out the grounds for a public authority which has received a compliance notice to appeal against any such notice. A public authority may appeal against a compliance notice on the following grounds: that it has not conducted itself in the manner stated in the notice; that the alleged conduct specified in the notice does not constitute a failure to comply with environmental law or, as the case may be, a failure to comply with environmental law that will likely continue or be repeated, or that the alleged failure is not causing, or has not caused, environmental harm or a risk of environmental harm.

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121. Subsection (2) states that an appeal must be made with 21 days of the date of issue of the notice, or it may be made later with the sheriff's permission. Subsection (3) provides for the sheriff to give permission under subsection (2) for an appeal to be made after the expiry of the 21-day period only if the sheriff is satisfied that the public authority has good reason for not making the appeal within the 21-day time limit. Subsection (4) states that the sheriff may cancel the compliance notice or confirm the notice, either with or without modifications. Where an appeal is made under this section, the period set under section 29(1)(d) for compliance with the notice is suspended until the appeal is finally determined or withdrawn. Onward appeals against a sheriff's decision will follow the routes of appeal set out in Part 5 of the Court Reform (Scotland) Act 2014.

Section 33 - Failure to comply with a compliance notice

122. This section provides for Environmental Standards Scotland to report to the Court of Session any case where a public authority fails, without reasonable excuse, to comply with a compliance notice. The Court of Session after receiving a report under this section, and hearing any evidence or representations on the matter, may make such an order for enforcement as it considers appropriate or deal with the matter as if it were a contempt of the Court, or both.

Judicial review and other civil proceedings

Section 34 - Power to apply for judicial review or intervene in civil proceedings

123. Section 34 sets out the circumstances in which Environmental Standards Scotland may apply for judicial review of a public authority's conduct or intervene in an existing case. These powers are expected to be used only rarely. The conditions for this are set out in subsections (1) for an application for judicial review and subsection (4) for intervening in an existing case: essentially where the conduct of the public authority constitutes a serious failure to comply with environmental law and were it necessary for Environmental Standards Scotland to act to prevent, or mitigate, serious environmental harm. In relation to applications for judicial review, the usual rules and procedure for such court actions will apply, including for example the potential to seek interim orders at the

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outset if there were considered a need to prevent imminent and serious environmental harm pending the outcome of the judicial review and the requirement to obtain permission from the Court of Session for the judicial review to proceed to be fully considered by it.

124. Subsection (1) allows Environmental Standards Scotland to make an application for judicial review in relation to the conduct of a public authority if Environmental Standards Scotland considers that the conduct constitutes a serious failure to comply with environmental law, and that it is necessary to make an application to prevent or mitigate serious environmental harm. This application may be made regardless of a compliance notice or improvement notice being issued to the public authority regarding the same matter.

125. Subsections (2) to (4) provide for Environmental Standards Scotland to intervene, with the court's permission or at its invitation, in existing civil proceedings relating to an alleged failure by a public authority to comply with environmental law. Subsection (4) places similar limits on this power, based on the serious nature of the failure and the serious effect on the environment, as apply in relation to the power under subsection (1). Subsection (5) permits the court to give permission to, or invite, Environmental Standards Scotland to intervene under subsection (3) only if it is satisfied that the intervention is likely to assist the court.

126. Subsection (6) provides for Environmental Standards Scotland to be treated as having sufficient interest in the subject matter of any application which it may make or of any legal proceedings in which it may intervene.

127. Subsection (7) defines "court" and "legal proceedings" for the purposes of this section.

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Disclosure of information

Section 35 - Disclosure of information to Environmental Standards Scotland

128. Section 35 ensures that public authorities are able to make appropriate disclosures to Environmental Standards Scotland.

129. Subsection (1) states that no statutory or common law prohibition or restriction on the disclosure of information prevents a public authority from providing Environmental Standards Scotland with information necessary for the exercise of its functions, in accordance with the authority's duty to co-operate under section 19(1) or an information notice issued under section 20(1).

130. However, subsection (2) sets out that a public authority is not required to provide information in certain circumstances. Firstly, where it would be entitled to refuse to provide it in civil proceedings on grounds of confidentiality of proceedings. Secondly, where it would be entitled (or required by common law) to refuse to provide it in civil proceedings on grounds of public interest immunity. In addition, subsection (3) (as read with subsection (4)) states that nothing in this Chapter requires or authorises disclosure of information which would contravene data protection legislation as defined by section 3(9) of the Data Protection Act 2018.

Section 36 - Confidentiality of proceedings

131. Section 36 provides for the confidentiality of information and correspondence relating to ongoing proceedings, where Environmental Standards Scotland is considering a potential use of its powers.

132. Subsections (1) and (2) prohibit Environmental Standards Scotland disclosing information or correspondence that relates to ongoing proceedings, subject to certain exceptions. For instance, it may disclose information it has obtained under this Chapter where it is for purposes connected with the performance of its functions. Disclosure is no longer prohibited once Environmental Standards Scotland has decided to take no further action on the matter to which the information or correspondence relates.

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133. Subsections (3) and (4) likewise prohibit a public authority disclosing information or correspondence relating to ongoing proceedings, other than with the permission of Environmental Standards Scotland or in the circumstances specified. These are where the disclosure concerned is made for purposes connected with: co-operating with any investigation being carried out by Environmental Standards Scotland; responding to any information notice or compliance notice, or any civil court proceedings.

134. Subsections (5) and (6) provide further conditions on when Environmental Standards Scotland may grant permission to a public authority to release information relating to proceedings under this Chapter.

135. Subsection (7) sets out what information is to be regarded, in the application of the Environmental Information (Scotland) Regulations 2004 to that information, as being information held in connection with confidential proceedings.

Interpretation of Chapter 2

Section 37 - Meaning of “public authority”

136. Section 37 sets out the meaning of “public authority” for the purposes of this Chapter, which determines the public authorities in relation to whom Environmental Standards Scotland has functions under section 16(1). It means a person exercising any function of a public nature, but it excludes Environmental Standards Scotland itself, courts and tribunals, the Scottish and UK Parliaments, UK Government Ministers and persons exercising functions in connection with proceedings in the Scottish or UK Parliament.

Section 38 - Meaning of “failing to comply with environmental law”

137. Section 38 defines the references to a public authority “failing to comply with environmental law” for the purposes of this Chapter. They are references to a public authority failing to comply with environmental law in any of the following ways: by failing to take proper account of environmental law when carrying out its functions; by carrying out its

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functions in a way that is contrary to, or incompatible with, environmental law, or by omitting to carry out its functions where the omission is contrary to, or incompatible with, environmental law.

Section 39 - Meaning of “environmental law” and “effectiveness of environmental law”

138. Section 39 provides definitions of “environmental law” and “effectiveness of environmental law” for the purposes of this Chapter.

139. Subsection (1) defines “environmental law” as any legislative provision that is mainly concerned with environmental protection and is not concerned with an excluded matter. Subsection (2) sets out excluded matters. Subsection (3) sets out the meaning of “legislative provision” as provision contained in, or in an instrument made under, an Act of the Scottish Parliament, and provision contained in any other enactment that would be within the legislative competence of the Scottish Parliament.

140. Subsection (4) excludes from the definition of “environmental law” Parts 1 to 3 of the Climate Change (Scotland) Act 2009. These provisions concern the setting and achievement of greenhouse gas emissions targets, which are subject to bespoke parliamentary procedures, and on which the Scottish Ministers receive advice from the Committee for Climate Change.

141. Subsection (5) to (8) provide for the Scottish Ministers to make regulations to set out that a legislative provision is, or is not, within the definition of “environmental law”. These regulations may specify Parts 1 to 3 in the Climate Change (Scotland) Act 2009 (or any provision in those Parts) as being within the definition of environmental law, and modify subsection (4) accordingly. This would allow Ministers to bring in future provisions to place the setting and achievement of targets relating to greenhouse gas emissions, or some subset of these measures, within the scope of Environmental Standards Scotland’s functions, if there was a future change in policy and institutional responsibility. Ministers must consult Environmental Standards Scotland, and any other persons they consider appropriate, before making such regulations. Regulations under subsection (5) are subject to the affirmative procedure.

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142. Subsection (9) defines “effectiveness of environmental law” and “effective environmental law” in terms of the law’s effectiveness in contributing to environmental protection as well as to improving the health and wellbeing of Scotland’s people, and achieving sustainable economic growth, so far as consistent with environmental protection.

Section 40 - Meaning of “environmental protection”, “environmental harm” and “the environment”.

143. Section 40 provides meanings for “environmental protection” at subsection (1), “environmental harm” at subsection (2) and “the environment” at subsection (3). Subsection (4) defines “human activities” for the purposes of the definition of environmental protection. These definitions are more developed than is generally the case in legislation that uses these terms, and are primarily required to ensure that there is clarity about the scope of the law that is within the purview of Environmental Standards Scotland.

Section 41 - Interpretation of Chapter 2: general

144. This section makes provision for a number of general interpretations relating to terms used throughout Chapter 2 of Part 2 of the Bill.

Part 3 - General

Section 42 – Purpose and effect of this Act

145. Section 42 sets out that the purpose of the Bill is to make provision in connection with the withdrawal of the United Kingdom from the EU.

146. At the end of the implementation period, the limits on the Scottish Parliament’s legislative competence in section 29(2)(d) of the Scotland Act 1998 will empty of meaning and EU law obligations will no longer apply to the UK by virtue of the ECA, as modified by the 2020 Act.

147. Subsection (2) prevents the Bill, or any provision made under it, from having effect in law, so far as it would be incompatible with EU law, before any relevant EU law ceases to have effect in Scotland. It postpones the effect of any provision contained in or made under the Bill that would be incompatible with EU law until after the provisions of EU

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law giving rise to the potential incompatibility cease to have effect as a consequence of UK withdrawal.

148. Subsection (3) takes account of the possibility that different provisions of EU law might cease to apply on different days and that the anticipated date of the end of the implementation period could change.

149. Subsection (4) defines EU law for the purposes of this section.

Section 43 – Regulations: supplementary

150. Subsection (1) provides that any power conferred by the Bill (apart from commencement powers in section 45) includes the authority to make different provision for different purposes. It also allows the making of incidental, supplementary, consequential, transitional, transitory or saving provision.

Section 44 – Ancillary provision

151. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with this legislation. Should such regulations be used to textually amend primary legislation they will be subject to affirmative procedure. Otherwise they will be subject to negative procedure.

Section 45 – Commencement

152. This section provides that, other than Part 3 of the Bill which comes into force the day after Royal Assent, the Scottish Ministers will specify the day on which the provisions in this Bill come into force through regulations.

Section 46 – Repeal of Part 1 of this Act

153. This section allows for the Scottish Ministers to repeal Part 1 of the Bill by regulations.

Section 47 – Short title

154. This section provides for the short title of the Bill.

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Schedule 1 - Environmental Standards Scotland

(introduced by section 15(3))

Independence from Ministers

155. Paragraph 1 sets out the separation and independence of the functions of Environmental Standards Scotland from the Scottish Government.

Members

156. Paragraph 2 provides for Scottish Ministers to appoint a Chair to Environmental Standards Scotland, with a further 4 to 6 appointments of ordinary members. Appointments are subject to approval by the Scottish Parliament and may not be held by an individual for more than a 4-year period. However, a member of Environmental Standards Scotland may be reappointed if the individual is a member at the time of reappointment or, has ceased to be a member not more than three months before the date of reappointment. Members of Environmental Standards Scotland may only be reappointed once.

157. Scottish Ministers may apply further terms and conditions of membership as appropriate, and regulations may be made, subject to the negative procedure, to amend the number of members that can be appointed.

158. Paragraph 3 sets out a list of types of persons that cannot be appointed as a member of Environmental Standards Scotland because of the roles they hold. It also sets out exclusions for insolvent or disqualified persons.

159. Paragraph 4 allows for Environmental Standards Scotland, with the approval of the Scottish Ministers, to pay its members and the members of any committee established by it. This includes expenses incurred by members carrying out their functions.

160. Paragraph 5 establishes that membership of Environmental Standards Scotland ends if: the member provides written notice to the Scottish Ministers and Presiding Officer of the Scottish Parliament that

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the member resigns; the individual becomes disqualified from being a member for the reasons set out in paragraph 3, or the Scottish Ministers provide written notice informing a member they are to be removed. The Scottish Ministers may only remove a member with approval from the Scottish Parliament.

Chief executive and other staff

161. Paragraph 6 establishes a Chief Executive for Environmental Standards Scotland. The Chief Executive may not be an appointed member of Environmental Standards Scotland. In the first instance, the Chief Executive will be appointed by the Scottish Ministers, with approval from the Scottish Parliament. All subsequent appointments will be made by Environmental Standards Scotland itself. Environmental Standards Scotland may also appoint its own staff alongside its Chief Executive. The terms and conditions of these appointments will be determined by Environmental Standards Scotland, subject to the approval of the Scottish Ministers.

Committees and functions

162. Paragraph 7 allows Environmental Standards Scotland to establish committees, whose membership may include (but may not consist entirely of) persons who are not members of Environmental Standards Scotland. However, those persons are not entitled to vote at meetings of the committee.

163. Paragraph 8 provides that Environmental Standards Scotland may authorise any of its members, any committee it has established, its Chief executive or any other member of its staff to perform its functions. This does not affect Environmental Standards Scotland's responsibility for performance of the function or prevent Environmental Standards Scotland from carrying out the function itself.

164. Paragraph 9 sets out that Environmental Standards Scotland may regulate its own procedure and that of any committee.

165. Paragraph 10 provides that a vacancy in membership, a defect in the appointment of a member or the disqualification of a person from

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being a member after appointment, does not affect the validity of actions taken by Environmental Standards Scotland or its committees.

166. Paragraph 11 states that Environmental Standards Scotland may do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the performance of its functions, or to be otherwise conducive to the performance of its functions.

Annual report

167. Paragraph 12 states that Environmental Standards Scotland must prepare and publish a report of its activities on an annual basis. This must be sent to Scottish Ministers, with a copy also laid before the Scottish Parliament. Environmental Standards Scotland may determine the form and content of the annual report.

Initial members: transitional provision

168. Paragraph 13 allows for a body to be established before the commencement date (which is the day on which section 15 (establishing Environmental Standards Scotland) comes into force). It will be known as the “non-statutory Environmental Standards body”. This provision is subject to the Scottish Parliament (by resolution) endorsing the establishment of the body by that name, and approving the appointment of the persons nominated to be its chair and other members. This paragraph also appoints the Chair of the non-statutory Environmental Standards body immediately before commencement date as the member to chair Environmental Standards Scotland.

169. Ordinary members of the non-statutory Environmental Standards body immediately before the commencement date are taken to be appointed as members of Environmental Standards Scotland. Appointment periods for initial members will continue to be the same as that for which they had been appointed as members of the non-statutory Environmental Standards body. Therefore, their appointment as a member expires at the time at which the period of their appointment as a member of the non-statutory Environmental Standards body would have expired.

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170. Unless exceptions are agreed between the Scottish Ministers and an initial member, the other terms of a member's appointment will continue to be the same terms as those on which the member had been appointed as a member of the non-statutory Environmental Standards body, so far as consistent with the Bill.

Application of legislation relating to public bodies

171. Paragraph 14 applies certain legislation relating to public bodies to Environmental Standards Scotland.

Schedule 2 - Environmental Standards Scotland: Strategy

(Introduced by section 18(2))

172. This schedule sets out provisions for the content and preparation of the strategy that Environmental Standards Scotland is required to prepare and publish under section 18(1).

Content

173. Paragraph 1 provides that the strategy prepared under section 18 must set out how Environmental Standards Scotland intends to perform certain functions, including at sub-paragraph (1) how it intends to: monitor public authorities' compliance with environmental law and the effectiveness of environmental law and of its implementation and application; provide for members of the public, non-governmental organisations and others to make representations to it and keep them informed about any action it takes in relation to those representations; exercise its functions so as not to overlap with other statutory or administrative complaints regimes or Parliamentary functions.

174. The strategy must also set out information on how Environmental Standards Scotland will decide whether to investigate possible failures by a public authority to comply with environmental law or the effectiveness of environmental law, as well as how it will carry out and prioritise investigations.

175. In addition, the strategy must set out how Environmental Standards Scotland will engage with public authorities with a view to swiftly resolving matters without recourse to formal powers, seeking to

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secure agreement to remedial action and improvements in the environment. The strategy must also set out how it will identify and recommend measures to improve the effectiveness of environmental law.

176. Subparagraph (2) states that the strategy must also set out the general factors that Environmental Standards Scotland will consider before exercising its functions, and how it will take account of information and form key judgments in the exercise of particular functions, including how it will determine what constitutes a systemic failure and how it will decide whether use of a compliance notice or an improvement report would be more effective. The strategy may also include any other information that Environmental Standard Scotland considers appropriate.

Procedure for publication of strategy

177. Paragraph 2 sets out the procedure for publishing the strategy. In particular, it provides that Environmental Standards Scotland must consult on its strategy, and present it to the Scottish Parliament for approval, alongside a report on the consultation.

178. If, within 40 days of it being laid, the Scottish Parliament resolves not to approve the strategy, Environmental Standards Scotland must review and revise the strategy and resubmit it to Parliament within three months. This process will repeat until a strategy is approved.

Publication of first strategy and interim strategy

179. Paragraph 3 states that Environmental Standards Scotland must lay its first strategy before the Scottish Parliament within the first year of its establishment. Environmental Standards Scotland may publish an interim strategy, covering the information set out at paragraph 1. Although, the publication of an interim strategy is not subject to the procedure specified in paragraph 2.

Review of strategy

180. Paragraph 4 provides for review and revision of the strategy.

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Explanatory Notes

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