Dear Gillian

The Air Quality (Amendment etc.) (EU Exit) (No. 1) Regulations 2018 and the Air Quality (Amendment) (EU Exit) (No. 2) Regulations 2018

Further to my letter of 29 November responding to yours of 27 November 2018 requesting some further information concerning the consent notification for the above SIs, please find a slightly amended version. It came to our attention that in questions 4 a), b) and c) we referred to the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 when it should have read the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2018.

The revised information is provided in the attached annex.

Yours sincerely

Roseanna Cunningham
1. Impact on devolved areas

The notification states with regard to impacts on devolved areas:

“Although air quality is devolved, all of the changes made by these instruments relate to policies and other procedures which are currently exercised on a joint UK basis for reasons of practicality, efficient use of resources and ease of collaboration. The intention is for this approach to continue and for the UK Government not to make any changes which potentially impact on the devolved administrations without first obtaining their consent.”

The notification however covers a number of Regulations which transpose air quality standards including emissions ceilings, which the UK Government could amend in future. It is not wholly clear in the notification (in light of the reference above to the intention that a joint UK approach should continue) if it is proposed that those powers to set standards will return to the UK Government or to devolved administrations.

Given the indication above that the 2 instruments which are the subject of this notification will continue the approach of the UK Government making changes that impact on the devolved administrations with their prior consent, could it be explained –

(a) Under the proposed Regulations, what powers to set air quality standards will return to Scottish Ministers?

The powers to set air quality standards are in section 87 of the Environment Act 1995. These functions are within devolved competence, and so were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998. No changes are being made to these powers.

(b) Where powers are conferred by the proposed Regulations on the UK Government, will the Scottish Ministers have powers to set more stringent standards?

The powers under section 87 of the Environment Act are already being used to set more stringent standards than the rest of the UK for fine particulate matter through the Air Quality (Scotland) Regulations 2000 and the Air Quality (Scotland) Amendment Regulations 2016. As discussed in relation to question 5 below, the Air Quality Standards Regulations 2010 are amended to transfer to the Secretary of State the functions of adopting and making changes to reference methods from the Commission in relation to the assessment of ambient air. It is proposed to mirror this transfer of functions in relation to the Air Quality Standards (Scotland) Regulations 2010 and to provide Scottish Ministers with the equivalent functions. This will be done by SSI.

2. Reporting on ambient air quality

The notification refers to a duty that will be conferred on Scottish Ministers to establish a publicly accessible data repository for Scotland.

(a) Will Scottish Ministers be in a position to meet this requirement from exit day in the event of ‘no deal’?

Air quality data are already publicly available in Scotland. Ambient air quality data, i.e. concentrations of certain pollutants as measured by the Scottish air quality monitoring network, are available on the Scottish air quality website www.scottishairquality.scot. Emissions data, i.e. mass emissions of certain pollutants from specific sources, are available.
on the National Atmospheric Emissions Inventory website (operated jointly by the UK administrations) www.naei.beis.gov.uk
Pollutant release data, i.e. information relating to industrial processes regulated by SEPA, are available on the Scottish Pollutant Release Inventory website www.sepa.org.uk/environment/environmental-data/spri

(b) Will the public have access to all of the same information under this system about air quality in Scotland as is available under current Regulations?

The public will continue to have access to all of the information outlined in 2a) above.

3. Transitional national plan

(a) What will the legal status of the Transitional National Plan be under the proposed Regulations?

The status of the UK Transitional National Plan (submitted to the European Commission on 20 October 2015) is not affected by these Regulations. It continues to have effect by virtue of the Large Combustion Plant (Transitional National Plan) Regulations 2015/1973, which require SEPA to ensure that participating plants do not exceed their emission allowances, as allocated or transferred under the Plan, and require operators to report actual emissions to SEPA. SEPA have confirmed that conditions requiring compliance with the TNP emissions allowance are included in permits issued to large combustion plant.

(b) How will progress on implementing the TNP be reported on in the absence of the duty to report to the Commission?

The Regulations replace the requirement to report progress to the Commission with a duty on the Secretary of State to publish annually (in such manner as the Secretary of State thinks fit) emissions data for each combustion plant included in the TNP.

4. BAT Conclusions

The notification states with regard to BAT conclusions that amendments are proposed to ensure that BAT conclusions (for several decisions on industrial emissions) will continue to apply in the UK after exit day. In its Technical Notice on ‘Industrial emissions standards (‘best available techniques’) if there’s no Brexit deal’, the UK Government has stated: “The European Commission holds a power to establish BAT Conclusions for the purpose of environmental permitting for activities within the scope of the IED, which are based on BREFs developed through the EU-level Sevilla process. In a ‘no-deal’ scenario, the UK would no longer be part of the Sevilla process. The UK government would make secondary legislation to ensure the existing BAT Conclusions continue to have effect in UK law after we leave the EU, to provide powers to adopt future BAT Conclusions in the UK and ensure the devolved administrations maintain powers to determine BAT through their regulatory regimes. The UK government will put in place a process for determining future UK BAT Conclusions for industrial emissions. This would be developed with the devolved administrations and competent authorities across the UK. The UK government’s Clean Air Strategy consultation for England also seeks views from interested parties on what the UK BAT regime might look like in the future.”
(a) Are the proposed amendments restricted to adopting existing BAT conclusions or do they give the UK or Scottish Ministers new powers to adopt future BAT conclusions?

The proposed amendments are restricted to adopting the existing BAT Conclusions published by the Commission under Article 13 of the Industrial Emissions Directive.

Separate regulations (the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2018), which will be subject to a separate notification to the Scottish Parliament, are proposed to give the Scottish Ministers the power to make regulations specifying future BAT Conclusions.

(b) How would the powers to adopt conclusions be exercised- would it be by transfer of legislative powers such as making future Regulations?

As will be set out in the notification to the Scottish Parliament for the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2018, the power to specify future BAT Conclusions would be exercised by the making of regulations.

(c) Can the Scottish Government provide any further information on what it anticipates the process will be for adopting future BAT conclusions and what the role of Scottish Ministers may be? Is this process under development or has it been agreed?

As will be set out in more detail in the notification to the Scottish Parliament for the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2018, the Scottish Ministers will have power to make regulations specifying BAT Conclusions. To the extent that devolved administrations consent, the Secretary of State will be able to make regulations specifying BAT Conclusions for the UK. The regulation making power will be subject to a public consultation requirement. The Scottish Government is working with the UK and other devolved governments to agree a process for the agreement and adoption of future BAT Conclusions for the UK.

5. The Air Quality Standards Regulations 2010

(a) The equivalent Regulations in Scotland which transpose Directive 2008/50/EC on ambient air quality are the Air Quality Standards (Scotland) Regulations 2010 (SSI 2010/204). Can the Committee expect that equivalent changes would be made to SSI 2010/204 to transfer the equivalent powers to the Scottish Ministers “consistent with the devolution settlement”?

The equivalent changes will be made by SSI as indicated in 1b) above.

(b) Can the Scottish Government provide more detail on what powers are being transferred to Scottish Ministers here, bearing in mind that an indicator for Category B is “sub-delegation- creating or amending a power to legislate, for example transferring EU legislative powers to a UK public authority”? Is a transfer of legislative powers proposed?

Regulations”), however a small number of the provisions in the UK 2010 Regulations apply to Scotland. These provisions (i) provide that the Secretary of State is the competent authority in relation to cooperation with other Member States and the Commission; (ii) set an average exposure indicator and national exposure reduction target for the whole of the UK for fine particulate matter PM2.5 and (iii) relate to notification of transboundary air pollution events. No substantive amendments are made to these provisions of the UK 2010 Regulations. The changes made to the UK 2010 Regulations which transfer to the Secretary of State the powers to adopt and make changes to reference methods apply in relation to England only. It is intended to make equivalent changes to the Scottish 2010 Regulations, which will be made by SSI as indicated above.

We are grateful to the Committee for its careful consideration of our notification and regret that the notification indicated that the UK 2010 Regulations transposed provisions for the whole of the UK relating to reference methods for assessment of air pollutants and that these were to be transferred to Scottish Ministers under these Regulations.

6. The National Emission Ceilings Regulations 2018

The notification explains that these Regulations transpose Directive 2016/2284/EC setting national emissions ceilings for certain atmospheric pollutants, and that the proposed amendments will transfer reporting and emissions projection responsibilities from the Commission to the Secretary of State.

(a) Can the Scottish Government provide more information on where powers to set or amend national emissions ceilings for the pollutants covered by Directive 2016/2284/EC will sit in the event of ‘no deal’ EU Exit?

The power to set national emissions ceiling measures required by Directive 2016/2284/EC is currently conferred on the Secretary of State by the National Emission Ceilings Regulations 2018 and that will continue to be the case in the event of a “no deal” EU exit.

(b) Will the Scottish Government have powers to set different (including more stringent) targets than those set at UK level?

As set out at (a), the powers under the National Emission Ceilings Regulations 2018 will continue to be conferred on the Secretary of State. The Scottish Ministers will continue to have powers to set emissions targets (including more stringent targets) under other legislation.