

# **Environmental Governance in Scotland on the UK's withdrawal from the EU**

**Assessment and options for consideration:  
A report by the Roundtable on Environment  
and Climate Change**

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**Scottish Government**  
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# Report on Environmental Governance in Scotland after EU Withdrawal

## Assessment and options for consideration

Prepared by a Sub-Group<sup>1</sup> of the Environment and Climate Change Round Table

### Executive Summary

A short preliminary study has been undertaken of the possible issues relating to future environmental governance in Scotland post-Brexit. The expert group involved in making the assessments included in this report has focused on maintaining Scotland's global position as a leader in environmental governance and performance. Whilst much may depend on UK:EU negotiations and arrangements provided and agreed with the UK in due course, and much remains uncertain at this point<sup>2</sup>, consideration is given directly to Scotland's policy and governance needs and to the main issues arising. Key areas where there is a risk of disadvantage without intervention concern access to expertise in professional policy and practice networks, access to skills and the value of oversight mechanisms provided by the Commission and the Court of Justice of the EU (CJEU) around verifying compliance with and enforcement of environmental law. Options for retaining membership of professional networks and securing appropriate oversight mechanisms are considered.

### 1 Mission and Scope/Remit

1.1 The scope for this Report and the work of the sub-group was set out in terms of reference (annex 1). It should "consider and provide advice in response to the following questions:

1. What potential gaps may arise, if any, in existing powers to monitor and enforce environmental standards in Scotland, should the UK exit the EU on terms which result in the loss of oversight of the CJEU and the European Commission?
2. Where gaps are identified, what options are there for providing appropriate levels of scrutiny, reporting and accountability in Scotland on environmental matters?

For each option proposed, please identify:

- a. The international comparators that have been considered in developing the option;

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<sup>1</sup> Members of the Round Table who form the subgroup are Lloyd Austin, Dr. Antonio Cardesa-Salzmann, Prof. Campbell Gemmill (Ch.), Jonny Hughes and Dr. Annalisa Savaresi. The subgroup co-opted Professor Colin Reid as a member. Additional support was provided by Bridget Marshall (SEPA), and Dr. Ian Jardine, Kate Thomson-McDermott and Keith Evans from Scottish Government as well as Isobel Mercer from RSPB and Professor Elisa Morgera.

<sup>2</sup> The work was carried out largely in February and March. Editing and updating was undertaken in May. The Defra Environmental Governance consultation - <https://consult.defra.gov.uk/eu/environmental-principles-and-governance/> - emerged as the final document was being produced.

- b. Any adjustments that would be required to the powers and functions of existing bodies to address identified gaps;
- c. If any options have been identified that cannot be implemented through changes to the powers and functions of existing bodies and a new body is proposed, please set out clearly its proposed scope and powers; and
- d. The way in which arrangements within the option proposed at a Scottish level might relate to the fulfilment of international commitments.”

1.2 The group accepted this “brief” whilst acknowledging from the outset its ambitious nature, challenging timetable and serious conditional uncertainties around the EU/UK/Scotland dimensions of the Brexit negotiation and development process.

1.3 The report which follows is set out in the following sections: the report’s remit, method of work and assessment; the main points emerging from a systematic analysis of policy areas, including identification of common issues and exceptions, as well as the most concerning potential losses, gaps or weaknesses post-Brexit; possible solutions and options for consideration; and final recommendations. This report is not the definitive work in this area but aims to offer a brief initial professional assessment by experienced practitioners, subject specialists and lawyers. We hope it is useful in guiding the way forward to stronger future governance.

## **2 MO and methods used**

2.1 The work of the group for this report builds on the previous work of the Round Table and was undertaken following an initial scoping meeting on 19 January 2018 primarily through three working meetings (2 February, 6 and 13 March) and correspondence principally during February and early March. We also acknowledge the value and utility of a range of resources<sup>3</sup>, including: UKELA’s report series on ‘Brexit and Environmental Law’<sup>4</sup>; RSPB Scotland’s unpublished discussion paper on the opportunities for strengthening enforcement of environmental laws in Scotland; the SULNE Report edited by

<sup>3</sup> *Study to assess the benefits delivered through the enforcement of EU environmental legislation -*

[http://ec.europa.eu/environment/pubs/pdf/Final\\_report\\_study\\_benefits\\_enforcement.pdf](http://ec.europa.eu/environment/pubs/pdf/Final_report_study_benefits_enforcement.pdf)

The number of formal infringement cases involving the UK are detailed at [https://ec.europa.eu/info/sites/info/files/file\\_import/national\\_factsheet\\_united-kingdom\\_2016\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/file_import/national_factsheet_united-kingdom_2016_en_0.pdf) and the number of environmental complaints across the EU is shown at the link – see p.24 of <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=SWD%3A2017%3A259%3AFIN&from=EN>

<sup>4</sup> The following UKELA reports were considered:

- Enforcement and Accountability Issues – July 2017
- Exit from the Euratom Treaty and its Environmental Implications – July 2017
- Brexit, Henry VIII Clauses and Environmental Law – September 2017
- The UK and International Environmental Law after Brexit – September 2017, including the so-called Scottish Annex (unpublished)
- The UK and European Co-operation Bodies – January 2018
- Environmental Standard Setting after Brexit – February 2018

Cardesa-Salzman and Savaresi<sup>5</sup>; and Greener UK's report, on 'The Governance Gap'<sup>6</sup> in shaping our consideration and findings.

2.2 The group developed a framework approach to assess the governance status and issues across areas of environmental law. The following areas were considered:

Nature Conservation and Biodiversity

Air Pollution Emissions, Transboundary Pollution and Climate Change issues

Environmental Impact, Access to Environmental Information and Environmental Justice

Marine Environment

Nuclear and radioactivity issues

Waste and Circular Economy

Water environment and Flooding

Chemicals, biocides and pesticides

General Governance

2.3 These areas were mapped against current legislative and governance arrangements, focusing on what happens and needs to happen at the Scottish level, when and if EU-level arrangements are removed. Hence, we considered the policy issues in summary terms in the following ways, first:

International framework and existing governance

European framework and existing governance

Any UK framework and existing governance, where possible indicating if these were established and operated through legislation, MoU or other administrative arrangement between UK nations.

Any Scottish framework and existing governance arrangements

For each policy area we also sought to capture key "other" issues, including connections with other policy areas as well as relevant financial and political considerations.

It was also acknowledged that the level at which governance was operationalized was important. For example, there could be a requirement to report performance internationally but the data might be collected and reported at a devolved, UK or EU level.

2.4 After completing this initial stage, we focused on identifying potential gaps, asking the following questions under each heading:

Implementation of environmental law and policy.

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<sup>5</sup> Scottish Universities Legal Network on Europe, *The Implications of Brexit for Environmental Law in Scotland* (2016): <https://sulne.files.wordpress.com/2016/12/environment-paper-sulne-20161214.pdf>

<sup>6</sup> Greener UK's report on 'The Governance Gap': [http://greeneruk.org/resources/Greener\\_UK\\_Governance\\_Gap.pdf](http://greeneruk.org/resources/Greener_UK_Governance_Gap.pdf)

- Will there be gaps that would result from the UK's exit from the EU?

Monitoring, measuring and reporting on the state of the environment

- Will there be gaps in current arrangements following the UK's exit from the EU? Consideration was also given to the review and reporting of information regarding both the state of the natural world and performance against policy objectives as well as the publication of such information.

Checking compliance with environmental law and policy

- Will there be gaps in processes and arrangements to check and ensure compliance with environmental law and policy that would result from the UK's exit from the EU? This included consideration of the ability of citizens and civil society organisations to raise complaints and/or seek investigations.

Enforcing environmental law

- Will the UK's exit from the EU result in gaps to appropriate enforcement of environmental law and policy to address any lapses in implementation and/or compliance, including the application of appropriate remedies and sanctions? This included consideration of the ability of citizens and civil society organisations to request enforcement.

Institutional co-operation

- Will the UK's exit from the EU result in gaps through loss of access to specialist co-operation bodies, networks and agencies relevant to environmental law? This included consideration of the loss of functions including the facilitation of cross-border co-operation, policy and best practice exchange as well as the development, implementation and enforcement of environmental law.

### **3 Summary of Main Points (by Sector)**

#### **3.1 Nature Conservation and Biodiversity**

3.1.1 The most important EU legislative provisions for nature are the Birds and Habitats Directives, and the Natura 2000 network of protected areas they create. These sit at the heart of the EU's approach to tackling biodiversity loss and have created a uniform and fairly prescriptive common framework for nature conservation across the EU Member States. The Natura 2000 sites are, however, the contribution of the EU and its member states to the Emerald network<sup>7</sup> of protected areas under the Bern Convention.

3.1.2 A raft of other EU Directives, regulations and institutions are also operational in this area; including MSFD (see marine section below), the EIA Directive (see below) and the Regulation on Invasive Non-Native Species (INNS). The EU's approach to biodiversity conservation was founded on the principles of a common and coordinated approach to transboundary issues

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<sup>7</sup> <https://www.coe.int/en/web/bern-convention/emerald-network>

and to protect shared natural heritage, for instance migratory species and habitat conservation across biogeographical regions.

3.1.3 On this basis, it is possible that – in relation to the making of future laws in the UK - the EU will demand that the UK retains regulatory alignment in some areas relevant to biodiversity conservation, in order to prevent a “race to the bottom” on environmental standards. These could include regulations on Invasive Non-Native Species and protection of migratory species among others. Future developments to EU laws in this area, such as updates to Schedules relating to protected species and habitats, will not be automatically reflected within domestic law, and a mechanism will be needed to review such changes and implement them where appropriate.

3.1.4 The loss of EU institutions will create, or widen, a number of governance gaps relating to biodiversity conservation.

3.1.5 The European Commission plays a key role in monitoring and reporting requirements for biodiversity and the Natura Network. Most of these functions are likely to fall to existing or new bodies within the UK, unless data are reported to an institution entirely independent of governments, resulting in a significant weakening of external scrutiny and accountability. A poor separation of powers in this area could affect, for instance, projects being consented within designated sites, the weight given to declining trends in biodiversity and scrutiny of derogations to the legislation on activities relating to protected species.

3.1.6 The governance gaps for biodiversity conservation will be most prominent in relation to enforcement and compliance. The complaints mechanism provided by the European Commission has been heavily utilised by individuals and civil society organisations in the nature sector and the oversight of the Court of Justice of the EU (CJEU) has strongly incentivised compliance. The Directorate General for the Environment (DG ENV) reported an average (mean) of 79 infringements per annum in the nature sector between 2007 and 2016.<sup>8</sup> The JNCC recorded 114 cases relating to the implementation of the Nature Directives in the UK, 18 of which were in Scotland.<sup>9</sup> These figures give an indication of the level of oversight that EU institutions have played in checking compliance with environment laws relating to biodiversity and the types of compliance issues that could go unchecked in the absence of such oversight.

3.1.7 Specialist EU bodies, agencies and working groups have played a strong role in supporting action in this area, particularly through biodiversity data collation which has allowed a comparison of biodiversity trends across the different Member States. This suggests that there may be capacity issues moving forward and that there is a need for continued collaboration between the Scotland/UK and some of these institutions. The most prominent EU body regarding this issue is the European Environment Agency (EEA) – some form of working arrangements with the EEA and the rest of the EU will be necessary to compare biodiversity data between the UK and other MS,

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<sup>8</sup> [http://ec.europa.eu/environment/legal/law/pdf/statistics\\_sector\\_from\\_2007\\_to\\_2016.pdf](http://ec.europa.eu/environment/legal/law/pdf/statistics_sector_from_2007_to_2016.pdf)

<sup>9</sup> JNCC Catalogue of case law relating to articles of the EU Birds and Habitats Directives (2016 version), available at: <http://jncc.defra.gov.uk/page-6780>

especially on migratory species and Invasive Non-Native Species (INNS); tackle pressures on biodiversity across shared biogeographic regions; and maintain up-to-date lists for protected species and habitats.

3.1.8 The EU Commission's role in agreeing the adequacy and distribution of SACs, based on biogeographic/ecological factors (especially from a continent wide perspective), could be replaced by scientific expertise in a domestic scrutiny body – this would provide validation for Government decisions as well as demonstrate our (former) Natura network was an appropriate contribution to the Emerald network. However, the system can operate without replacing the EU Commission's role in approving the justification where a project affecting a priority site falls outwith the narrow range of ordinarily approved overriding purposes; this would, though, mean that there will be no external scrutiny of government decisions.

### **3.2 Atmosphere (Air Pollution and Climate Change, excluding Energy)**

3.2.1 In this area, the more obvious benefits of EU membership are that the UK has been able to rely on the EU's law-making, governance arrangements, cooperation and support mechanisms (including the EU Emission Trading Scheme, ETS, and the Fluorinated Gases, F-gases, Registry), both to devise measures to reduce emissions and to scrutinise the implementation of these measures.

3.2.2 As far as the making of law is concerned, after Brexit, formally the UK will no longer be required to align with EU law on air pollution and climate change. Nevertheless, EU law presently is the conduit through which the UK implements many of its international obligations in these subject areas, including under the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement. The UK will therefore need to look carefully at how international obligations under air pollution and climate change treaties are implemented after Brexit<sup>10</sup>. The numerous instruments on Ozone Depleting Substances are a specific cause of concern and need to be looked at in greater detail to better understand the implications of Brexit in this complex and composite area.

3.2.3 Though much will depend on ongoing negotiations between the EU and the UK, current EU governance arrangements in this subject area (including for example the EU ETS and the F-gases Registry) are unlikely to service the UK after Brexit. These arrangements therefore have to be replaced urgently to avoid a cliff edge.<sup>11</sup> Both on ETS and F-gases, the adoption of a UK-wide approach, within devolved responsibilities would be desirable, both for

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<sup>10</sup> Annalisa Savaresi, Evidence to the ECCLR Committee, Scottish Parliament (2018) available at: [http://www.parliament.scot/S5\\_Environment/Inquiries/Annalisa\\_Savaresi\\_written\\_submission.pdf](http://www.parliament.scot/S5_Environment/Inquiries/Annalisa_Savaresi_written_submission.pdf) and Annalisa Savaresi, Evidence submitted to the Environmental Audit Committee, UK Parliament (2017) available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/fgases/written/74991.html>

<sup>11</sup> House of Commons Environmental Audit Committee, UK Progress on Reducing F-gases Emissions, 2018. <https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/469/469.pdf>

efficiency – given that all administrations will have to make up for the shortcomings associated with the demise of the EU ETS and F-gases Registry – as well as expediency considerations – given that Scotland is only responsible for a fairly small part of the UK’s emissions covered by the EU ETS and F-gases Registry.

3.2.4 After Brexit, some continued collaboration with EU cooperation institutions, such as the EEA, in order to enable benchmarking, peer-review and peer-pressure in relation to emissions quantification and reduction measures, would be desirable, though not indispensable.

3.2.5 As far as the enforcement of law is concerned, general considerations raised in other subject areas apply here too. In addition, the implementation of air pollution standards both in Scotland and in the UK is an area where significant shortcomings already exist. This is therefore an area that needs to be carefully monitored and where specific remedies may be needed.

3.2.6 Finally, even after Brexit, UK business exporting to the EU will be under pressure to continue aligning with EU standards concerning products, for example on emissions from vehicles.

### **3.3 Environmental Impact, Access to Environmental Information and Environmental Justice**

#### Environmental assessment

3.3.1 Environmental assessment (EA) is the collective name for various statutory processes that inform decision makers about the likely significant environmental impact of a proposed decision, plan or strategy. In itself, EA does not determine the decision. Rather, a range of statutory procedures are in place which require decision-makers to remain informed of, and take into account, the results of EA before a decision is made or a plan or strategy adopted.

3.3.2 Where this is not already the case, most EU-derived EA legislation will, in the first instance, be converted into domestic law by the proposed European Union (Withdrawal) or Scottish Continuity Acts.

3.3.3 In relation to SEA (the assessment of plans, policies and proposals), Scotland has deliberately and purposely legislated beyond the requirements of the relevant EU Directive. This leadership on SEA could be curbed if any newly developed common framework constrains any of the UK nations from going above and beyond requirements.

3.3.4 A major loss of European Commission functions would, as with many areas, mainly relate to monitoring and reporting – both on standards but also co-ordinating cross-border issues.

3.3.5 However, the most significant loss will be enforcement and upholding compliance. The loss of access to the European Commission complaints mechanism will substantially reduce the ability of individuals and civil society organisations to request action where they believe EA has not been properly carried out. Furthermore the loss of CJEU oversight – representing a threat of



enforcement and possible financial penalties – is likely to weaken the incentives across the UK for ensuring that EA laws are complied with.

3.3.6 As with many other areas explored in this report, some form of continued cooperation or working arrangement with EU institutions, agencies and working groups – most notably the EEA – is desirable in order to ensure continued best-practice sharing and comparison of data on transboundary projects. However participation in these groups is not a fundamental requirement to ensuring functionality in this area.

Environmental justice (including Access to environmental information, Public-participation in decision-making, Access to justice in environmental matters)

3.3.7 While many aspects of this issue are non-legislative, especially the public participation process, the Aarhus Convention is the overarching international treaty that addresses these matters.

3.3.8 Some of the requirements of the Convention are transposed into EU Directives and regulations. The European Union (Withdrawal) Act or the Scottish Continuity Bill will convert all existing EU legislation in this area into domestic law, but questions remain about how this legislation will be safeguarded from inadequately scrutinised amendments in the future and whether a provision will be implemented to remain in step with EU law in this area. For instance, the Commission does not currently monitor compliance with Pillar 3 (Access to Justice) of the Aarhus Convention, but this may change if the recent Commission Notice on Access to Justice in Environmental Matters is accorded weight. If these issues are not addressed then the UK could be more out of step with the EU in regards to its Aarhus compliance, which as discussed below is already criticised by eNGOs.

3.3.9 The UK and EU report separately to UNECE on the implementation of Aarhus requirements, so no monitoring and reporting gap will arise here. However, in the view of some stakeholders, Defra-led reports on behalf of the whole UK tend to be sparse in regard to devolved administrations' implementation.

3.3.10 The view of the UK and Scottish Governments is that all jurisdictions in the UK are “in compliance” but the eNGOs believe that there is already a gap in the implementation of the requirements of the Aarhus Convention, both in the UK and in Scotland, particularly regarding Pillar III - Access to Justice. A recent ruling of the ACCC<sup>12</sup> (Aarhus Convention's Compliance Committee) on prohibitive expense supports the eNGOs' perspective, while a communication<sup>13</sup> that will lead to a ruling on substantive legality has been accepted<sup>14</sup>.

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<sup>12</sup> [https://www.unece.org/fileadmin/DAM/env/pp/mop6/in-session\\_docs/ECE\\_MP.PP\\_2017\\_CRP.6\\_E\\_United\\_Kingdom.pdf](https://www.unece.org/fileadmin/DAM/env/pp/mop6/in-session_docs/ECE_MP.PP_2017_CRP.6_E_United_Kingdom.pdf)

<sup>13</sup> [https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2018-156/Communication\\_UK\\_RSPB\\_07.12.2017.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2018-156/Communication_UK_RSPB_07.12.2017.pdf)

<sup>14</sup> The sub-group would note that following a consultation last year, the Scottish Civil Justice Council (SCJC) have established a working group to consider the policy issues emerging from the SCJC's consultation on draft rules for Protective Expenses Orders and make recommendations to the Council for revised procedural rules to strengthen that protective system.

3.3.11 Access to justice in environmental matters is seen by environmental interests as an 'at risk' area within this topic. While the UK will remain signatory to the Aarhus Convention and existing EU legislation in this area will be carried forward, the loss of the European Commission and European Parliament functions discussed above, as well as access to the CJEU represent a potentially significant narrowing of the scope to challenge Government on these issues over the longer term. Unless some of these functions are replicated in a domestic context then the ability of individuals and civil society organisations to make their voices heard on environmental matters will be substantially reduced. This could be addressed through amending the procedures of existing institutions or pursuing a number of new institutions

### **3.4 Marine Environment**

3.4.1 We have not at this stage been able to carry out an extensive analysis of marine environment issues. The situation is more complicated because of the executive nature of the devolution of powers beyond 12 nautical miles.

3.4.2 In many policy areas, the same considerations apply to the marine environment as to other environments, for example in relation to the provisions of the EU Nature Directives and international conventions such as the Bonn Convention on the Conservation of Migratory Species of Wild Animals and the Ramsar Convention on Wetlands of International Importance. Therefore, for protected areas there may well be the same issues as those mentioned in relation to terrestrial and freshwater environments. There are however additional, specific aspects that will need to be considered to be addressed, such as future policy on implementation of the measures in the Marine Strategy Framework Directive, as well as how marine and freshwater/terrestrial processes interact (e.g. Water Framework Directive coastal waters). These are not considered in detail here. Nor have we attempted to consider the many complex issues that will arise from EU withdrawal in relation to marine fisheries, which are subject to consideration by others including the marine and seafood stakeholders group.

3.4.3 There are specific transboundary considerations to be taken into account for marine protected areas, which are the result of both EU and international law obligations. Specific legal instruments and agreements would come within the scope of any consideration of devolved administrations' 'environmental duties' and where any new arrangements to allow scrutiny or challenge would apply. International obligations are particularly significant here, including the UN Convention on the Law of the Sea (UNCLOS) and the Convention for the Protection of the Marine Environment of the North-East Atlantic (the 'OSPAR Convention'). The latter contains provisions to protect the marine environment and there is a regional agreement on the protection of small cetaceans concluded as the "Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas" under the auspices of the UNEP Convention on Migratory Species.

3.4.4 Scotland has been at the forefront of the development of marine spatial planning and, at a UK level, the UK Marine Policy Statement under the Marine

and Coastal Access Act 2009 sets out an agreed framework for preparing Marine Plans and taking decisions affecting the marine environment. Continued implementation of the UK Marine Policy Statement will be fundamental to achieving and maintaining Good Environmental Status. It is therefore key to successful transition from EU level arrangements, as defined in the Marine Strategy Framework Directive, to an increased significance of international law arrangements such as the OSPAR Convention.

3.4.5 Because of their significance, international agreements and obligations in marine governance arrangements are likely to highlight any constitutional disagreement over responsibility for international matters. As in other areas, to the extent that reliance comes to be placed on international rather than EU obligations, the international ones tend to be less precise and to have weaker monitoring and enforcement mechanisms than those laid out by EU law, but this gap could be addressed or reduced, for example by appropriate transposition of international obligations into national legislation.

### **3.5 Nuclear and radioactivity issues**

3.5.1 In 1956, under the UN treaty, a Statute was established creating the International Atomic Energy Agency. It came into force in July 1957. The UK was one of 56 founding signatory nations. Based in Vienna the IAEA provides a range of services and has in essence membership/signatory requirements on the issues relating to safe non-military use of nuclear technology and related aspects of health, safety, security and environment as well as on safeguards and verification.

3.5.2 Since 1957 the EURATOM Treaty has also provided a strongly connected framework for consideration of radioactivity and nuclear issues within the member states (MS) which are the same states over time as the EC/EU ones. A range of Directives has been developed giving legal force and policy shape to operational requirements for safe use of radioactivity and handling of materials, and for the long term management of spent fuel and radioactive waste. The operational aspects of the Treaty are delivered by DG Energy of the European Commission working directly and in partnership with staff in EU Member States to provide advice, assessment and oversight, including inspections, which, together, connect to enforcement mechanisms under the ECJ.

3.5.3 Many of the high hazard areas of potential environmental impact relating to radioactivity in Scotland are not under devolved control in important areas. The two generating nuclear energy stations are part of EDF Energy. The three civil Decommissioning Sites are under the control of the GB Nuclear Decommissioning Authority, that reports primarily to UK Ministers, with parallel responsibility to Scottish Ministers for aspects of their functions in Scotland. The safety regulation of nuclear installations is reserved to the UK Authorities, and is carried out by the Office for Nuclear Regulation (ONR), a UK Government body. SEPA regulates radioactive wastes from nuclear installations, including in liquid and gaseous forms. Ministry of Defence sites are exempt from both statutory safety and environmental controls. Safety regulation is carried out by the Defence Nuclear Safety Regulator, which is answerable to the Secretary of State for Defence. A parallel non-statutory system of environmental regulation is carried out under an agreement

between the MoD and SEPA. The Scottish Government has a stated policy intention to bring MoD sites into the framework of statutory environmental regulation arrangements. Other radioactivity issues concern principally the medical, food, geophysical and oil and gas sectors and the use and/or collection of particular radioactive sources and materials under controlled conditions. These have all been considered preliminarily.

3.5.4 Currently, operational control is overseen for nuclear power plants and hospitals, waste facilities and other users identified, using existing licensing arrangements by the UK Office for Nuclear Regulation, by local government and health bodies, by SEPA and by BEIS Offshore for the various sectors. Relevant aspects concerning worker safety also connect to ONR and at the most general level to the HSE. The key EU directives as established in UK and Scots law currently governing basic safety standards and irradiation, use and keeping of radioactive materials as well as the storage of wastes are generally highly effectively governed within the UK and Scotland.

3.5.5 In addition, independent/oversight inspections of and advice on facilities in Scotland are undertaken under the provisions of both IAEA and EURATOM, with the latter more frequent and visible.

3.5.6 Whilst we understand that it is the UK government's intention to remain a compliant IAEA member, the main issues arising under Brexit scenarios relate to the extent to which the UK, and therefore, Scotland remains adherent to the IAEA conventions, processes and requirements, and also whether this is a suitable and sufficient oversight and advisory mechanism for what is lost through leaving EURATOM.

3.5.7 In particular and additionally, it appears that access to and networking with relevant international expertise, as well as the ability to attract and retain staffing in key roles and support services in specialist areas could be restricted, thus potentially compounding the already limited and increasingly stretched resources left to attend to monitoring, expert independent scrutiny and oversight and, ultimately, enforcement. This could affect both our ability to identify failures and to ensure the adequate management and mitigation of hazards and provide sufficient public reassurance.

3.5.8 Some kind of Associate EURATOM membership and access to services were this possible might have compensating advantages. But the question remains as to what powers and efficacy of enforcement would exist if the UK chose to see this as optional.

3.5.9 In relation to Naturally Occurring Radioactive Material (NORM)<sup>15</sup> and sources in oil and gas in particular, there are several issues around coastal, national and international waters and how the various components of current law would evolve and fit. This requires clarification.

3.5.10 In almost all facets of the radioactivity space, strengthening of existing (UK and Scottish) regulators and/or establishment of dedicated UK and especially Scottish oversight entities may need to be considered.

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<sup>15</sup> NORM is generated in the form of mildly radioactive, low level waste as muds and solid deposits from drilling and pipework handling processes in the oil and gas industry, including decommissioning and requires dedicated waste management.  
<http://www.gov.scot/Topics/Environment/waste-and-pollution/Waste-1/16293/NORM>

### **3.6 Waste and Circular Economy**

3.6.1 Our initial analysis highlights that the common issues identified across all topics in relation to reporting and oversight functions of the Commission and ECJ are also of concern in waste management.

3.6.2 Further detailed analysis is required on at least the following areas: definitions (including the definition of waste and the classification of hazardous waste), technical standards, producer responsibility, product standards and labelling and transfrontier shipment of waste.

3.6.3 There is a large amount of European legislation relating to different aspects of waste management and a level of complexity in the existing domestic legislation will remain (and increase) when the legislation is rolled over under EU Exit legislation. It has been the ambition of UK and Scottish policy over many years that much of the legislative complexity associated with technical treatment standards (landfill, batteries, Waste Electrical and Electronic Equipment, End of Life Vehicles etc.) will be removed at the domestic level once waste is incorporated into the integrated regulatory framework under the Regulatory Reform (Scotland) Act 2014.

3.6.4 Some areas related to waste management regulation are reserved such as the product and labelling requirements of the WEEE, Batteries and ELV Directives and the Transfrontier Shipment of waste.

3.6.5 In terms of the circular economy Scotland has a particularly ambitious policy agenda and has historically been ahead of other member states and the EU in terms of thinking around the circular economy. The new legislative measures in the EU Circular Economy Package sets new stretching targets and ambitions for waste and resource management to 2030.

3.6.6 There may be benefit in or need for considering some issues around the wider UK context and the issues of standards and trade. Adapting to new global trade arrangements for access to markets and receipt of goods will likely need a revised understanding of product standards classification and accreditation schemes, etc.

### **3.7 Water Environment and Flood Risk Management**

3.7.1 The implementation of the Water Framework Directive and associated EU legislation for water governance follows a de-centralised and regionalised approach. Compared to other devolved administrations, Scotland has opted for a highly ambitious implementation of EU commitments under the WEWS.

3.7.2 This said, many technical specifications for the implementation of the Water Framework Directive throughout the EU are cooperatively developed through the informal, expert and stakeholder driven Common Implementation Strategy (CIS). In this context, the European Commission plays a significant role in the so-called intercalibration process, through which regional and local interpretations and contextualisation of environmental standards are harmonised. The Commission facilitates this process through exchange of information between Member States. This institutional and regulatory link with the EU process will be lost after the UK's withdrawal. However, the importance of the CIS, to which SEPA has been a leading contributor, has

diminished over time and is not critical for the implementation of the Water Framework Directive in Scotland. Given the extent of devolved powers in this matter, nothing should prevent Scotland from maintaining full regulatory alignment in the future if this objective was sought.

3.7.3 Within the UK, the implications of Brexit for the future of inter-agency coordination and advisory groups relevant to the implementation of the Water Framework Directive, such as UKTAG and JAGDAG, remain unclear. Yet, as an entirely devolved matter, Scotland will maintain fullest legislative and executive powers in order to pursue a largely autonomous water policy.

3.7.4 Equally, the Floods Directive is now fully embedded in domestic legislation and will be delivered through a suite of strategic flood risk management cycles. The UK's exit from the EU will mean that Scotland is unable to help shape future changes made to the reporting requirements. However, there are no significant gaps envisaged resulting from the UK's withdrawal.

3.7.5 The points made above highlight the valuable role of knowledge exchange. Given the stance adopted on water issues in Scotland thus far and the Cabinet Secretary's commitment to maintain standards, Scotland's longer term commitment to, and performance in, protecting the water environment and contributing to global policy and implementation, suggest a strong position. There may also be opportunities to develop policy which is better suited to the specific Scottish water environment.

### **3.8 Chemicals, biocides and pesticides**

3.8.1 The European Chemicals Agency (ECHA) manages the technical, scientific and administrative aspects of the implementation of EU chemicals regulations which are presently implemented directly in the UK and have wider connection to other EU regulations enforcement achieved at national level. Whilst still unclear, the UK's exit from the EU may mean that the UK will no longer be serviced by the European Chemicals Agency and the related EU law framework (REACH). This is therefore an area where present governance arrangements would not function. Retaining membership of ECHA, as was suggested by the UK Prime Minister, would be the easiest short term solution. This is also an area where UK businesses will need to continue to apply EU rules in order to sell their products in the EU marketplace.

3.8.2 In addition to the general concerns identified in this report around reporting and oversight functions fulfilled by the EU Commission and the CJEU, there are additional issues which are particularly concerning within chemicals, notably a loss of influence in a commercially important global sector where significant companies operate in Scotland currently, capacity at Scotland and UK levels and the benefits of a UK framework.

3.8.3 REACH applies to all EEA Member States. The ECHA has "cooperation agreements" with regulatory agencies in Australia, Canada, Japan and the USA, which focus on exchanging information and knowledge regarding the management of chemicals. In addition, Switzerland and Turkey have enacted legislation that mirrors REACH, but is developed and implemented in an autonomous manner. Companies in non-EEA member states that wish to

trade chemicals with the EU have the option to nominate an 'only representative' agent registered in an EU member state to take over the responsibility of complying with REACH. Alternatively, the obligation for compliance will fall to the importer. In none of these arrangements would the UK have much influence. It remains to be seen whether the UK can negotiate an exit deal that allows it to retain any influence.

3.8.4 The loss of influence at the EU and international level is particularly concerning in this area. 13% of the unique companies who registered chemicals under REACH in 2017 were based in the UK. The UK has been a significant actor in terms of registering and evaluation of substances. The ECHA has also highlighted the role that the UK has traditionally played by using its influence to support proportionality. The UK has been important in arguing that decisions should reflect a proportionate (balanced) approach to risk rather than adopting a very precautionary and risk-averse attitude. Scotland, nonetheless does not necessarily align with Westminster's approach to risk when it is in its remit to do so.

3.8.5 In the UK, the Chemicals Regulation Division (CRD), part of the Health and Safety Executive (HSE), is responsible for the much of the regulations on chemicals and for the Competent Authority functions within EU legislation regulating industrial chemicals where HSE is the appointed authority for the UK. CRD employs around 250 scientific, policy and support staff. It is possible that for a new or existing authority to undertake the same workload with no access to the existing EU networks and system would require a substantially larger workforce, as well as significant start-up/extension costs in the short term. Depending on the outcome of the ongoing discussions on internal allocation of EU powers, lack of capacity could be an issue for devolved administrations, as further discussed in section 4.5 below. The increase of staff in some Departments of the UK Government to deal with Brexit demands may well need to be replicated in Scotland.

3.8.6 Within the UK, regulation of chemicals is an area where the adoption of a UK-wide approach, within devolved responsibilities would be desirable, as all industry across the UK will need to continue to comply with EU rules in order to sell their products on the EU marketplace. Scotland has always relied on UK wide expertise in the area of chemicals management.

### **3.9 Industrial Pollution Control**

3.9.1 In our consideration of environmental media we addressed air, water and waste, above. Soils and a range of other issues also interconnect with these media. It is also relevant to consider integrated, cross-cutting and general industrial pollution issues. These issues are largely addressed by the Industrial Emissions Directive (IED, 2010/75) and the precursor IPPC (Integrated Pollution Prevention and Control) Directives.

3.9.2 The framework for integrated pollution prevention and control was set out in the IPPC Directive in 1996, 96/61. The IPPC Directive, "PPC" in shorthand, has been amended and extended, focussing on wastes as well as processes, to become the practical centre-piece of industrial emissions control and materials management. The understanding of the value of

integration was based both on notions of administrative coherence and simplicity and therefore tractability for enterprise management but crucially on the learning that different approaches to controlling emissions or releases to air, water and land separately resulted in the shifting of polluting materials and their impacts (often “wastes”) between the environmental media rather than protecting the environment overall.

3.9.3 PPC consolidated and incorporated a number of previous directives, including those relating to waste management, including the Landfill Directive, driving closure or retrofit of those facilities without gas and leachate collection, as well as air pollution and industrial process management. PPC has now in turn been recast, alongside 7 other directives (on titanium oxides and their management and surveillance, on reducing VOCs, on waste incineration, IPPC 2008/1, and relating to large combustion plant) into IED.

3.9.4 IED seeks to coordinate the authorisation and management of environmental permits ensuring integrated measures for air, water and land have been put in place. It, like PPC, is rooted firmly in the notion of Best Available Techniques (BAT) and the reference documents (BATRefs or BREFS<sup>16</sup>) for a wide range of industrial processes whereby specialists have brought together expert views of appropriate abatement, process control and operational equipment, standards, procedures and practices that will achieve appropriate control, energy efficient performance and management information for effective materials management, pollution performance monitoring and environment and health protection, including that of workers. Geographical conditions, other local loadings and the characteristics of the facility are also taken into account to achieve a transparent permit system. Emission Limit Values are also a part of this model and it is now possible to have a single licence that brings all the key aspects of operation and the releases permitted, in one document, which can then be assessed against actual performance on a regular basis.

3.9.5 PPC and IED also now require elements of public consultation, via cross-compliance with the PPD (Public Participation Directive, 2003/35), ensuring greater transparency on permit conditions and performance.

3.9.6 Collaboration on pollution prevention and control policy, practice and information sharing as well as legal pursuit around environmental crime across Europe has been another area of increased co-operation in recent years, between regulators and police forces as well as borders and customs agencies. This has helped to address pollution risks, unfair competition, criminal activity generally around illegal trade and dangerous goods and has enhanced best practice learning between jurisdictions.

3.9.7 The same loss of influence, networking access, data sharing and lack of capacity issues appear to apply in this area. Access to BREF/BAT knowledge and participation in the BREF centre processes has given Scotland and the UK opportunities to shape and to benefit from early, authoritative and ongoing

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<sup>16</sup> Permitting of IPPC/IED processes makes detailed use of BREFs. There are currently 34 Best Available Techniques Reference Documents produced by the EU Industrial Pollution Prevention and Control Bureau, with extensive annexes. These are made under an exchange model for information gathering and assessment under the IED.



standards, best practice, market, technology, process and legislative information, insights and positions. Loss of access has the potential to weaken industrial and economic development strategy, impact on competitiveness and trade arrangements as well as lead to a lessening of alignment, exchange and cooperation between regulators and policy makers.

### **3.10 Control of Major Accident Hazards**

3.10.1 A further area which we have not covered in detail is major accident hazards under Directive 2012/18/EU (Seveso). This Directive was left to the national authorities to implement within the EU skeleton, but there is an obligation on the Commission to report on the implementation and functioning of the scheme every four years and more significantly provision on information sharing between Member States and Commission (art 21). Presumably on Brexit the UK will no longer be included in this system, removing the need to provide information but cutting us off from what is being gathered across the EU on this topic, including the database of major accidents which is used to spread information and lessons between authorities in the EU (although parts of this are public). Again, there is nothing here fundamentally different in structure from what occurs in other areas, but it provides another example of a useful function organised through EU structures.

### **3.11 Noise**

3.11.1 We have also briefly considered the EU measures on environmental noise. These measures were incorporated by Scottish regulations and represent an area where subsidiarity has been given considerable weight. The mapping, assessment and action plans, however, are still subject to reporting to the European Environment Agency. Directive 2002/49/EC involves some reporting directly to the Commission: therefore, infraction proceedings may be initiated, if inadequate measures are being taken.

3.11.2 On specific sources of noise, there are EU standards for maximum noise levels and testing and approval. These are classic single market issues which would seem to call for a unified approach within the UK. For trade reasons close alignment with the EU would seem preferable to developing individual standards. Much EU law in this subject area has been transposed already into domestic law. In common with many other areas, the significance of the EU environmental law is that the government is required to act on certain issues, has to report what it is doing and can be called to account if it falls short.

## **4 Issues of Commonality Arising**

### **4.1 Introduction**

4.1.1 From the analysis of issues undertaken in 3, section by section, the group sought to identify where we found the same types of potential constraint. One significant factor will be future policy choices, influenced by the future relationship with the EU. As EU law develops, should Scotland

commit to remaining in step with EU law in this area, and if so, how? Or, should Scotland weaken (or strengthen, or restructure) the provisions if, for instance, other parts of the UK do so? The wider context will also be important in determining how cross-border issues will be addressed.

4.1.2 On withdrawal from the EU, the UK will no longer be bound by EU law but will still be subject to many international law obligations relating to the environment. Indeed many EU measures were introduced to implement the EU's international obligations and/or to jointly implement those of its Member States. The EU is party to numerous international environmental treaties alongside, and sometimes *in lieu* of, its member states. As a matter of international law, the UK will remain a party to all environmental treaties it has ratified prior to Brexit, whether or not the EU is a party to those treaties as well.<sup>17</sup> Conversely, the UK will not be a party to treaties the EU alone has ratified. EU environmental law often builds on and scales up obligations embedded in international environmental agreements, providing more ambitious levels of protection. EU law obligations are furthermore supported by an enforcement machinery which is much more vigorous than that supporting international law obligations. Unplugging from EU law will entail that, in most areas, the UK will be subjected both to lesser and less enforceable international environmental obligations. So while after Brexit, the UK's international obligations will continue to require the monitoring of environmental problems, as well as the reporting and implementation of measures to remedy these, such obligations will be less precise, subjected to lesser scrutiny, and devoid of the enforcement procedures which are typical of EU law.<sup>18</sup>

## 4.2 Monitoring, Measuring and Reporting

4.2.1 EU membership has provided the framework, drivers and opportunities, not least through legislative requirements and also through relationships, for the sharing of information between jurisdictions and the membership of groups and processes. These have provided access to data and opportunities for Scotland and the UK to input to processes.

4.2.2 One aspect of EU membership that has emerged frequently in our considerations has been Scotland's current engagement with a wide range of European environmental networks and bodies with which we share data and knowledge. EU bodies such as the EEA and the ECHA provide firstly a source of data that assists environmental bodies across the EU in carrying out their tasks and in assessing comparative performance, and secondly a forum for sharing expertise and good practice at various levels. These also allow benchmarking against EU and other international performance. After withdrawal, Scottish bodies may be able to maintain membership of some of these EU bodies, but for others special arrangements will have to be made to enable at least some continuing involvement, and access to databases and other sources of information. The position varies according to the constitution

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<sup>17</sup> ref UKELA paper - <https://www.ukela.org/content/doclib/320.pdf>

<sup>18</sup> Savaresi A, 'The Impact of Brexit on Environmental Protection in Scotland: Some Early Reflections' (2017) 22 *Edinburgh Law Review* 115

of each EU body, in some cases requiring rule changes to enable participation by countries outside the EU or EEA.<sup>19</sup>

4.2.3 Our review identified capacity as a cross-cutting issue. At present, EU bodies provide capacity as well as access to data, best practices, etc. In addition, Brexit preparation is already placing significant strain on the capacity of government and others to develop appropriate responses. This demand will continue and grow. We note a recent report outlining the resources made available for Brexit-related work in Whitehall<sup>20</sup>, including 1200 new “EU exit roles” in DEFRA. How this work is undertaken in Scotland will be a policy decision, but capacity to address the governance gaps identified in this report will be needed.

#### Reporting about the environment: environmental data

4.2.4 Gathering and comparing robust environmental data are essential to support evidence based policy making. On leaving the EU, the UK will still need to fulfil a wide range of international commitments to provide information and data, which are used to create international datasets in order to assess compliance and progress under international treaties and agreements. In some cases data are aggregated at EU level before transmission to wider international bodies such as the Secretariats of international treaty bodies. When the UK is outside the EU, all reports will be made directly to the relevant international body. However there are additional EU reporting requirements where the information provided is for use by the EU itself. It would provide clarity if a policy commitment were given to the effect that this range of data gathering and reporting for various purposes and to various other bodies would continue, even when there is no longer a requirement to report to the EU.

4.2.5 Usually data are firstly aggregated at UK level before transmission, as it is the UK, as party or Member State, which has the duty to report. Again it would be helpful to clarify which data will be aggregated at UK level to allow for comparisons and benchmarking after Brexit.

4.2.6 Data to fulfill the UK’s reporting commitments in relation to environment and climate change are currently gathered through a wide range of specialist organisations. The actual gathering and preparation of these data, in that this is currently undertaken by existing bodies at Scottish or UK level through NDPBs<sup>21</sup>, research institutions and other parts of government, would not require new governance arrangements to be in place.

4.2.7 However at present the European Union, often through agencies such as the European Environment Agency, provides a capacity to quality check and analyse data, and to provide benchmarking information, which adds value and applies pressure on Member States to complete reports and to improve the quality of these reports. This capacity will be lost unless agreement is reached to maintain a relationship with these bodies. Loss of access to comparative information across Europe and loss of access to expertise and

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<sup>19</sup> ref UKELA report - <https://www.ukela.org/content/doclib/326.pdf>

<sup>20</sup> [https://www.instituteforgovernment.org.uk/sites/default/files/publications/cost-of-brex-it-what-whitehall-spending-insight-final-vb\\_1.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/cost-of-brex-it-what-whitehall-spending-insight-final-vb_1.pdf)

<sup>21</sup> Non-Departmental Public Bodies

databases at European level is a common concern across the areas we have considered.

4.2.8 Future information gathering and presentation at a Scottish or UK level can continue to be performed by the organisations that already perform this function. We do not see a need for a new body or functions to perform this role.

#### Reporting about the environment: Reporting on the application of environmental laws

4.2.9 Reporting on the actions taken to comply with international treaties and protocols can be part of a country's commitments and where this is needed we assume it will continue, based on current arrangements within the UK. However the requirements in terms of reporting on the application of EU law and its effect are usually more stringent.

4.2.10 We gave some consideration to the role performed by EU, UK and Scots law. Some sources of EU law set out what can or must be done (powers and duties) and others, including some key EU Directives are somewhat more focused on setting out what outcomes are required to be achieved. Reporting on whether legislation is meeting its purpose as well as whether it is in place and being implemented are both important to understanding the state of, and prospects for, the environment. Reporting to the EU often covers not just the transmission of factual data but assessments of the state of implementation, compliance and progress, for example on the progress towards the favourable conservation status of species protected under the EU Habitats Directive.

4.2.11 While it is assumed that reporting requirements contained in EU Directives will become part of retained EU law, they will become ownerless in the sense that reporting will no longer be to the European Commission. It would be useful to clarify the intentions as to the recipients of such reports in the future but we assume that in the first instance such reports as they relate to Scotland would be for Scottish Ministers to publish them and make them available to the Parliament and the public.

4.2.12 Such reports can continue to be prepared as at present by the responsible public body to ensure this information is still publicly available and we do not see a need for any new structure. There may however be a need to clarify the procedures for publishing these reports in the future and a policy commitment to doing so would be reassuring. In the longer term, a review of reporting duties and procedures could help to streamline and clarify their purpose. If duties apply to retained EU law but not, or not equally, to domestic law the situation will become confused over time as legislation is amended.

4.2.13 An important advantage of reporting in a consistent way across the EU is that data are (more likely to be) comparable and we can use systems and databases developed by specialist organisations at the European level. This provides useful comparators to assess our own performance and also wider access to data, knowledge and expertise. It has also created opportunities for Scottish and UK experts to increase their knowledge and influence in the creation of these procedures. While we expect that international collaboration is certain to continue, we consider that options for continued engagement with

and, where possible under their constitutions, membership of European expert bodies such as the European Environment Agency (which already includes non-EU members) should be actively pursued. The work of many EU agencies and bodies is recognised world-wide and the benefits of continued participation are not limited to the European continent.

### **4.3 Scrutiny and Investigation**

#### Scrutiny of reports, independent assessment, examining compliance and progress

4.3.1 The UK is currently subject to EU mechanisms scrutinising the transposition and proper implementation of EU law. When the European Commission receives reports from Member States it has the power, access to expertise and capacity to assess these and ensure that Member States are compliant with requirements, and it can measure progress against objectives and propose actions where needed. This capacity is independent of the Member States and will be lost on leaving the EU. When operating well these processes help to ensure Member States strive to fulfill their commitments but also provide them with valid comparators with other EU nations and validate the actions of those Member States that have a good record of implementation. The loss of this independent scrutiny of performance at a supranational level is one of the issues of highest concern to environmental NGOs in the UK, who have also canvassed public opinion on the issue.

4.3.2 On leaving the EU there will be no comparable body or bodies performing these functions for Scotland. Ministerial and Parliamentary scrutiny and accountability become the 'ceiling' when the EU level is removed. Whether there should be an independent scrutiny function is a policy decision and the arguments for it are essentially about openness and transparency and the right for citizens to be well informed about an issue of high public interest, to be able to access reliable information about the state of their environment and the performance of public bodies in relation to it and, where appropriate, to have their concerns addressed.

4.3.3 Several international treaties have expert bodies tasked to analyse reports and provide comment on compliance and progress in the implementation of State obligations. However, these arrangements vary greatly from one treaty to the other, and generally do not provide significant powers to sanction instances of lack of compliance.

4.3.4 It can be argued that there is a number of bodies in civil society such as academic institutions, non-governmental charitable bodies, professional and expert institutions who will, no matter what else is in place, undertake the scrutiny and analysis of environmental reports and publish their conclusions. Their reports could be used by Parliamentary Committees to challenge or question Ministers and public bodies on performance. In terms of public interest the main advantage of this option is it is inexpensive for the public purse. However it will depend on these non-governmental bodies' decisions on what they think is worth examining. Also, some of these bodies will have policy objectives in terms of influencing public opinion and public policy, and their analyses may be viewed, by some, as part of "an agenda". It is therefore

important that this analysis and scrutiny function is undertaken by a fully independent body.

4.3.5 The functions of existing publicly funded bodies such as SEPA, ZWS and SNH could be expanded to give them a larger role in compiling, analysing and presenting reports and assessing performance and compliance. This is again relatively straightforward in building on existing structures but will have a cost in terms of increasing the capacity of these organisations. More significantly however, arguably, these bodies will not be seen as genuinely independent of government given their financial and strategic policy dependence on Ministers and current governance arrangements, if there is no higher oversight body or mechanism. Indeed, they would on occasions have direct regulatory responsibility for the areas on which they are reporting, creating a potential conflict of interest – or an appearance of “marking their own homework”, even if their boards serve as mechanisms designed to secure a measure of independence.

4.3.6 There are of course bodies within the public sector that are more clearly genuinely independent of government and have functions to examine and report on compliance and performance. These include roles such as those of the Information Commissioner, the Public Appointments Commissioner, the Children and Young People’s Commissioner, the Scottish Human Rights Commission and Audit Scotland<sup>22</sup>. While some of these bodies have powers to look across government their functions are designed for quite specific purposes and thus while Audit Scotland has quite wide powers and scope its focus remains on the effective and efficient use of public money rather than on the achievement of policy objectives in themselves. Thus while expanding the role of an existing body might be simpler in some respects it is likely to distort the current balance of duties and require the recruitment of new expertise. Specialist sectoral bodies with duties to provide independent expert assessment in specific policy areas already exist, such as HM Inspectorates, the Health Improvement Service etc.

4.3.7 The remaining option we have considered therefore is the establishment of a new function in a body which might be called the ‘office of environmental scrutiny and audit’. This would be an independent public body, able to draw on the expertise and knowledge of other bodies both public and private. It could have a core staff with sufficient expertise to quality control its findings and reports and provide expert judgement, but be able to commission, or access additional information, from other public bodies.

4.3.8 We have not at this stage attempted to work out a detailed scope or remit for such a body, but besides being independent of government it would need powers of scrutiny and investigation and, of course, resources. The advantage of this solution is that it meets the concerns that have been voiced by environmental interest and provides potentially the most comprehensive solution to the likely governance gap in relation to scrutiny. The disadvantages are clearly that it would take time to establish and would be an additional cost with no obvious offsetting savings (other than time currently

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<sup>22</sup> See <http://www.parliament.scot/abouttheparliament/27110.aspx> for details of the parliamentary commissioners and equivalents

taken to respond to European Commission reports and requests).<sup>23</sup> Were this to be seen as a preferred option a short term solution should also be considered based on existing bodies, perhaps augmented by a fixed term 'expert panel' to consider any reports produced, until any new body was operational.

#### Initiation of studies and reports

4.3.9 The European Commission has the capacity not just to receive and assess reports but also to initiate *ad hoc* studies and reports often by commissioning research consultancies or bodies such as the European Environment Agency, the European Topic Centres, or through mechanisms such as Fitness Checks of specific pieces of legislation. These studies may have a pre-investigative fact-finding purpose as a precursor to more explicit investigation. Such a power to commission reports may need to be replicated after Brexit.

4.3.10 The Scottish Government can also of course commission any studies or research it considers necessary to help the effective and efficient implementation of its environmental policies and to assess progress. However if the value of independent scrutiny is accepted it would seem logical that whichever solution is adopted to provide this, there are also appropriate powers to initiate as well as receive reports. This will necessitate powers to request information from other bodies, and if necessary to compel a response. Once more there are resource implications.

### **4.4 Considering Complaints**

4.4.1 EU law currently empowers citizens to report to the European Commission instances of lack of compliance with EU law. The Commission has discretion to act upon the information received, which can ultimately lead to infringement proceedings before the CJEU. After EU withdrawal, this function will no longer exist. This is seen by environmental NGOs and experts (including some regulators) as having been an essential means of ensuring Member States take their duties seriously and acting as an incentive for the Member State authorities to deal with concerns and complaints before they reach the Commission, or before they escalate to more formal stages. The number of cases raised in this manner has been pointed to as an indication of both the value and necessity of such mechanisms. Interestingly however the number of complaints received by the Commission regarding environmental law has been declining in recent years (348 in 2016) which is hopefully an indication that Member States are more familiar with what is required in order to comply or more effective in responding to concerns at a national level.

4.4.2 At a domestic level, citizens have a range of options to pursue concerns, through the complaints procedures on public bodies, through their elected

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<sup>23</sup> As with all forms of scrutiny, one form of "savings" that will arise is that it will cause implementation/decisions subject to that scrutiny to become/remain of a high standard – and thus prevent costly appeals/challenges/compensation/restoration. It is therefore possible to view this as "preventative spend" – a short-term cost, but preventing longer term, larger increases in costs.

representatives, through the Scottish Public Sector Ombudsman or directly to Parliament through the Petitions procedures. Again, the remit and powers of existing bodies could be reviewed to provide additional capacity to receive and investigate complaints about lack of compliance. The potential weaknesses are the same as for other aspects: perceived lack of independence (NDPBs); current limitations on scope (SPSO<sup>24</sup>); or lack of specific expertise and knowledge of environmental issues. One of the concerns identified in our investigations is that any examination of complaints should be able to consider the merits of a case and not just the legality and procedural propriety, which would require an understanding not just of environmental law but of environmental science and policy.

4.4.3 Were a new body to be established to provide scrutiny functions as discussed above, it should also have powers to consider and investigate complaints. The body should be able to exercise discretion in the exercise of this power to ensure the use of its resources is prioritised to the most significant concerns.

4.4.4 It is also worth considering where the European Commission has a role in scrutinising and commenting on some proposals before the Members state acts, for instance in approving lists of sites intended for designation under the EU Habitats Directive or approving proposals to allow developments adversely affecting protected sites containing priority species or habitats for reasons of over-riding public interest. This also extends to approving programmes under EU funding mechanisms such as Structure Funds or the Common Agriculture Policy (Rural Development Programmes). We have assumed these decisions will be devolved matters and there will be no supranational decision-making body. Decisions in these kinds of area will therefore receive less independent scrutiny than at present and can be expected to be a focus of concern and potential challenge. Publication of clear procedures and responsibilities in these areas, possibly including the new body as a statutory consultee in the development of such proposals, will help to ensure transparency and accountability.

## **4.5 Mechanisms to seek solutions**

4.5.1 One of the valuable functions that the European Commission performs at present is to engage with Member States in order to seek resolution of concerns and problems. At one level it seeks to avoid problems arising by preparing guidance based on experience. The Commission also supports reports of best practice and a range of professional and expert bodies and networks that can assist the responsible authorities in each Member State to address challenges and improve implementation. There are several sector specific procedures such as the Common Implementation Strategy for the Water Framework Directive that set standards and expectations and reduce disagreement.

4.5.2 Beyond this, the Commission will normally engage directly in discussion with a Member State where it believes there may be a valid complaint and seek a resolution. This usually begins informally but there is also a series of

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<sup>24</sup> Scottish Public Services Ombudsman



formal steps (such as the exchanges of letters and investigations, pursuant to the procedure under Article 258 of the Treaty on the Functioning of the European Union) before any complaints are elevated to the level of the CJEU.

4.5.3 Were a new body to be established it would be valuable to give it a role in terms of supporting best practice and in seeking and negotiating solutions to any valid concerns on implementation to avoid undue pressure on courts (assuming legal challenges will be an option – see following sections). In the absence of a new body it would be for the relevant public body under the supervision of Government and/or Parliament to decide if it wished to change its approach in response to complaints and taking account of the risk of subsequent legal challenge if it failed to do so.

#### **4.6 Powers to refer a Public body to a court**

4.6.1 At present, once the European Commission has exhausted the procedures to seek an agreed solution over questions of compliance with EU law, it can refer a case to the CJEU for judgement. These judgements are binding on the Member States and if not acted upon financial penalties can be imposed.

4.6.2 The main current mechanism to challenge lack of or poor implementation of EU law in the domestic courts is judicial review, as well exemplified by recent litigation brought by Client Earth concerning air pollution levels in the UK. At present a judicial review can be brought by any legal entity with appropriate standing. There is not a public body charged with referring other public bodies to a court for their failure to properly implement environmental law. The current arrangements for judicial review have been questioned by environmental NGOs on the grounds both of their scope and affordability (and therefore their compliance with the Aarhus Convention); we note this is an area of current disagreement.

4.6.3 The nature of many EU measures is to impose obligations on the government to achieve specific outcomes (e.g. a target for air or water quality or for recycling rates). Traditionally judicial review proceedings concentrated on process and procedure. In the face of targets, such as those imposed by EU law, after Brexit, UK (and Scottish) courts will be called on to consider substantive outcomes in a way that has not been required in the past and which may present challenges for existing courts and their procedures. If a policy decision were to be made to seek to replicate the role of the CJEU in domestic courts (either on reference from a scrutiny body or by direct application from a citizen or community), there may need to be a parallel review to consider the need to replicate any of the structures and procedures of those courts within the domestic system. This review could consider the merits, or otherwise, of revising judicial review rules, the creation of an Environmental Court<sup>25</sup>, or other measures – to ensure both full compliance with the Aarhus Convention and the need, as expressed above, to address outcome, scope and affordability issues.

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<sup>25</sup> Such a court might be either a new court or an expansion of the Land Court.

4.6.4 Were a new body created it could have powers to refer cases to a court as the European Commission does at present; or it could simply report its findings to Parliament. In the latter instance, Parliamentary condemnation and criticism may be regarded as entailing sufficient sanction. Alternatively, third parties may be empowered to initiate legal proceedings based on the findings of the public body. Such third parties would however face challenges in establishing title to sue and cost and difficulty in establishing a substantive remedy that ensures environmental remediation. If new procedures to register and investigate complaints in the environmental sector were introduced, then judicial procedures would have to be co-ordinated with these. At this point we have not considered the implications in detail.

#### **4.7 Powers to order interim measures**

4.7.1 Although rarely seen in practice, the CJEU can require interim measures, for example to halt developments, until a final ruling is made. Such powers are replicated in domestic courts, but similarly rarely invoked, not least because the party winning an interim remedy is liable for the losses suffered by the other party if at the full hearing it is determined that the action interdicted was in fact legitimate. Such powers are potentially important and should be retained, and indeed reviewed to ensure an effective means of preventing serious harm.

4.7.2 Some public bodies, such as local authorities, and NDPBs, such as SNH, can impose or seek temporary restrictions on developments and activities, usually until such time as a full assessment is made and / or subject to appeal. While powers could be given to a new body to halt developments, which are of concern, it would perhaps be more consistent if such powers remain with a court. Should a new body be created then it should be clear that it is empowered to seek such action by a court where it believes it to be essential.

4.7.3 In addition, there may be a need for a Court to be empowered, on application, to make an order preventing the Government or a public body from implementing (or not implementing) a decision – if that decision is subject to challenge/review. In practice, most Governments/public bodies voluntarily refrain from implementation when subjected to existing appeal/review decisions, but it is possible that circumstances may arise where a petitioner for review (or the scrutiny body) may wish to seek such an order.

#### **4.8 Powers to require Ministers or a public body to comply and to impose sanctions**

4.8.1 The CJEU, as a supranational authority, has powers to order Member States to remedy failures in their application of European environmental law and, if this does not occur, to impose financial penalties. At the end of 2017 the CJEU had 48 cases open where a Member State had failed to comply with a judgment on EU environmental law and where fines could be considered. Four of these were UK cases. These financial penalties to remedy failures in the implementation of environmental law do not exist in UK law, and environmental interests cannot always be directly compensated.

4.8.2 We envisage that political accountability through Parliament or legal accountability through the courts would remain the routes to hold public decisions takers to account. However, Parliament and the Courts need to have appropriate remedies available to perform this well – it may be that, in some circumstances, the remedies available to the courts need to be reviewed/widened to address issues of restoration and/or the requirement for Government to take specific (or any) action to deliver an outcome.

4.8.3 Powers already exist to require restoration of environmental damage where specific unlawful activity has taken place (although different regimes contain inconsistent provisions). This does not cover damage caused by a regulator taking an improper decision. Further, such measures apply on a site specific or geographical basis. Failures that result in non-compliance on a wider scale, such as failure to ensure compliance with air quality standards, are harder to remedy. In the latter connection, the requirement to take the necessary action to meet the standard or target may involve government securing a response from many different actors. Where the law specifies remedial steps (such as the action plans under the air quality legislation that has featured in recent cases in England taken by ClientEarth), the initial steps to be ordered by the court are clear, but in other cases it may be difficult for a court to identify specific steps to be taken.

4.8.4 The power of the CJEU to effectively tell national Governments what they must do and ultimately to impose fines has often been presented as an effective deterrent and the key ‘threat’ that secures compliance at earlier stages even if little used in practice.

4.8.5 There are several issues for potential consideration around the nature of sanctions and remedies, their visible use for appropriate ends and the corporate and personal dimensions of addressing failure and remedy, especially where it involves the use of public funds<sup>26</sup>. We are sceptical that a system by which public bodies, including Ministers, can be fined and the money recycled back into another part of the public purse would be seen as a good use of these funds. Nor would removing resources from environmental authorities help to improve their performance. Nevertheless a range of sanctions on public bodies found to have breached environmental duties or legal requirements could be considered. In other jurisdictions sanctions such as loss of public office are used. We believe the key issues concern first the impact value of the sanction, penalty or remedy as a deterrent or “punishment”, and secondly, the ability of a devised remedy to address the

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<sup>26</sup> There are also issues which could be considered around compensation. There is not space to address this in detail. However, Brexit will entail the loss of "Francovitch" type damages claims, whereby an individual can receive compensation when their individual rights have been infringed and they have suffered loss as a result of a failure to implement EU law. There have been Scots law private actions on losses suffered as a result of breaches of public law powers. These include breach of statutory duties, misfeasance in public office and commission of another recognised civil wrong such as negligence. It is also possible to attach a damages claim to a judicial review action but such claims are usually vindicatory rather than compensatory. Francovitch damages have not been claimed often in the environmental area because of the need for the rule infringed to be intended to confer rights on individuals and the need for a direct causal link between the breach of the obligation resting with the member state and the damage sustained.

environmental problem identified as the cause of complaint. The focus therefore should be on requiring the public body affected or the Government to take the remedial action that is needed and the primary issue is therefore environmental, even if there is a necessary public or political consequence in addition.

#### **4.9 Unique components and major flags of concern**

4.9.1 In general we found similar governance concerns arise across the topic areas considered. Two categories however are mentioned as potentially requiring an urgent resolution at UK level:

- the need to review the UK's membership of international agreements which have been signed by the EU but not separately by the UK, such as the 2013 Minamata Convention on Mercury.
- the need to agree how existing governance arrangements which operate on the basis of EU quota schemes, such as the EU ETS or the F-gases registry, will operate in future and we encourage the Scottish Government to continue to press the UK Government on this issue.

#### **5 Potential Solutions and Options**

5.1 The current European arrangements that provide supranational oversight for compliance with environmental legislation have been important to secure and to demonstrate compliance by Member States. In Scotland there are well-established systems and procedures for holding public bodies to account for their performance and to provide challenge in the event that there is a perceived breach of legal powers and duties or a failure of performance. However, these are not as well developed nor as extensive as those that apply at EU level.

5.2 There is therefore a valid case to consider additional measures to increase the levels of scrutiny and challenge that are available after leaving the EU (should that proceed). The arguments for this are essentially to ensure that levels of compliance and performance are not reduced if the levels of scrutiny and the availability of sanctions is reduced or removed. Maintaining environmental quality and standards is of significance to the entire population and therefore not the prerogative of any sector of society. There is therefore a valid case to argue that the public sector should provide a means to demonstrate transparently what standards are being achieved and to allow these to be examined and questioned effectively.

5.3 There are options to do so within the current structures of accountability and responsibility in Scotland, but also an argument for adding to these structures to provide an additional level of independent expertise. In general we have taken the view that without the EU level, the effective 'ceiling' for issues around achievement of policy commitments and the effectiveness of actions is the Scottish Parliament and these are matters on which Parliament holds Government to account, and the issue is about what Parliament would need to be able to do so effectively. Where issues arise that are about implementation and compliance with law, these are primarily issues for courts.

While we note that a number of international agreements have their own mechanisms for reporting on compliance, we also note that these are limited in their scope and effectiveness compared with that provided by the EU.

5.4 In the Table appended at Annex 3 we set out in general terms what some of the options are. In essence however for issues of monitoring and reporting we have not identified a strong argument for a new body, but propose that clear commitments about what public bodies will continue to monitor, and what information will be published, would help to allay concerns. At a future date a review of environmental reporting and monitoring may help to rationalise current programmes.

5.5 For functions of scrutiny, investigation, consideration of complaints and seeking resolution of concerns, we present several options should it be concluded that these gaps require to be reduced or closed. Some of these are based on expanding the role of existing bodies. Where those are existing government environmental bodies there are questions of independence and objectivity. Where these are existing scrutiny bodies with independence from Government there are questions of expertise and whether such new duties would imbalance their existing functions. The question therefore arises about the need for a new independent scrutiny body in relation to the environment. Here too there is a wide range of possibilities in terms of the scope and remit of such a body that we have not attempted to elucidate at this point. While it is possible to envisage that these functions (scrutiny of reports, initiation of reports, receipt and investigation of complaints, seeking resolution, publication and transmission of findings) could be given to different bodies, there is also a logic in terms of developing expertise and capability of seeing them as a coherent set of responsibilities.

5.6 There are also options in terms of how much expertise any body would require itself or whether it would have powers to draw on the expertise of others, and commission reports and analyses from other bodies in order to do its work. At one extreme the body could be an expert panel referring all detailed work of investigation and compilation of reports to others but acting as the guarantor of quality control and of independence. Otherwise there is a range of options that involves establishing a new statutory body or bodies with the appropriate functions.

5.7 We also consider the functions that would be more appropriate for a court and again there are options to give roles to an existing court or to establish a new more specialist court or tribunal dealing with environment matters. We have not investigated these options in detail but highlight that to replicate the current EU functions it would be necessary to review current rules regarding the procedures for judicial review, in particular the capacity of courts to consider the merits of an argument and not just matters of procedure, rationality or legal interpretation.

5.8 The imposition of fines or sanction, which is a power – if rarely used – of the CJEU, is often cited as the crucial backstop or incentive to ensure compliance. In the absence of a supranational authority it will be challenging to reproduce such a function at a Scottish level. The option would be to give the Scottish courts powers to impose sanctions on public authorities in situations where a failure to comply with legal environmental duties has been

proved. The nature of those sanctions and required remedial actions has not been explored – but ideally the remedies available should focus on righting the environmental wrong.

#### Short term / long term

5.9 We have briefly considered the timescales for providing solutions should these be agreed. At present, when the nature of any transition period for leaving the EU is unclear we are unable to offer clear advice. However, we foresee that there may be a need for interim measures should a policy decision be taken to establish a new body given the likely lead in time to establishment. An interim position based on an expanded role for existing bodies perhaps supported by an independent supervisory panel would seem the most pragmatic.

#### Engagement with European Institutions

5.10 Throughout our examination of the wide range of environmental functions currently governed by EU law and procedures we have noted repeatedly the significant role of expert European bodies in helping to ensure not just that standards are met but that the justification of these standards, the means of achieving them and the sharing of best practice and benchmarking information are based on best available data and knowledge. Scotland has contributed to, and benefited from, this expertise and we recommend an urgent assessment of options for continuing to draw on this knowledge and expertise after EU withdrawal.

#### UK dimension

5.11 The policy and political context for environmental governance at the UK and EU level has been somewhat fluid during the preparation of this report. The Report was initially provided to a deadline in mid March. We have endeavoured to reflect or at least note major developments between that time and the Report's completion. We are now (18 May) aware that the Secretary of State for Environment, Food and Rural Affairs has announced an intention to consult on a proposal for a new statutory body to undertake some of the functions outlined above. At this point we understand the proposal is that the body should have authority over England and reserved UK matters. This could be problematic.

5.12 While the negotiation of international agreements is a reserved matter their implementation, where it relates to the exercise of devolved powers, is not. Should questions arise about the UK's implementation of an international agreement, whilst not explicitly Brexit related, it may very well require consideration of both reserved and devolved functions. The position of the four administrations is not equivalent, with the UK Government responsible for otherwise devolved matters in England and with a separate legal system in Scotland, unlike Wales.

5.13 To some extent, the EU (which often is a co-signatory with member states to international agreements) has to date provided an element of commonality across the four UK jurisdictions. To address this, post-Brexit, there has been much debate about possible "common frameworks" (of a variety of forms: legislative and non-legislative, jointly developed or otherwise, etc.). One governance gap that will exist, post withdrawal (and subject to any

agreement on 'alignment' within the withdrawal agreement) is how to effect, where needed (e.g. in relation to international agreements or cross-border matters), the commonalities previously provided by the EU. One model may be the Marine Policy Statement (see paragraph 3.4.1, above) which commits all jurisdictions to the high level policy goals of the OSPAR agreement and the Marine Strategy Framework Directive – but with each jurisdiction responsible for implementation in their areas of responsibility.

5.14 The systems of accountability should also follow the agreed allocation of responsibility and therefore, where authority is devolved, the devolved procedures for accountability, including in Scotland's case the Scottish Parliament and separate Scottish legal system are the appropriate basis to pursue issues of compliance and performance.

5.15 Nevertheless some issues may cut across national boundaries within the UK or cut across the reserved / devolved boundaries and therefore involve more than one, or indeed all four administrations. For example studies of compliance with international standards may be better undertaken on a UK basis for reasons of both effectiveness and efficiency.

5.16 This does not imply by any means that the only solution would be a UK body. Indeed having a Scottish body with a thorough understanding of Scottish law, procedures and systems would be more focused on the issues that are most significant in a Scottish context. Scotland is of a scale at which we can envisage a separate body being justifiable and effective. However, we suggest that consideration be given to how arrangements might best work across the UK to allow collaboration, comparisons, efficient use of expertise and promotion of best practice.

5.17 If all four administrations conclude that a new statutory public body is the best solution, this could be achieved by several different routes, including:

- a single UK legal body but with strongly devolved elements accountable separately in the four administrations.
- four separate national bodies that are required to co-operate and work jointly on some aspects
- four separate bodies that between them establish a co-owned unit or function to consider UK wide aspects of compliance

5.18 Finding the best solution will require all four administrations to work jointly to secure the best balance, respecting the devolution settlement and allocation of authority.

## **6 Recommendations for Future Work**

6.1 This has been a brief, focused and quickly delivered project with significant dedicated time and expertise used. Nonetheless we were only able to do so much in the time available and although members gave their time generously, there were several areas where we had insufficient information or access to relevant inputs and other practical limitations on our consideration.

6.2 Several areas, especially where policy and governance concerns coincide, require or would benefit from further research and consideration with expert input. We are happy, if needed to explore this and offer further views were this desired and helpful.

6.3 The Group considers that it would also be helpful to examine international examples such as the Parliamentary Commissioner for the Environment in New Zealand and the Future Generations Commissioner for Wales, as well as the current Commissioner for Sustainable Development in Victoria State, Australia and the former Sustainable Development Commissioner in Canada.<sup>27</sup> Several overseas jurisdictions, including those with devolved/federal arrangements, have also established (Land, Resources, and) Environmental Courts or Tribunals. Whilst recognising the different constitutional settings and powers etc., these may prove instructive in suggesting possible approaches applicable to Scotland's situation.

6.4 Should a decision to be taken to establish a new body (or bodies) then the Round Table would be happy to advise in more detail on its potential remit and scope.

## **7 Conclusions**

7.1 This paper has identified a number of functions, notably in reporting, monitoring and enforcement, that are carried out through the EU machinery but will be lost on the UK's withdrawal. These are important for good governance in terms of transparency and accountability and for the proper functioning of Scottish authorities in fulfilling their environmental responsibilities. In deciding how, if at all, these should be replaced, some design issues arise. These do not require the same solution in every case and interim measures may be appropriate whilst more enduring arrangements are put in place:

- the functions could be conferred on a ministerial advisory body, on a parliamentary body, or on existing bodies given expanded remits, or on a new body;
- to be effective and achieve public confidence, any such body must have independence from government and the regulatory bodies, must have the expertise and capacity to do its work, must have a guarantee of the resources necessary for its role and must have the powers required to fulfil its tasks;
- there must be effective ways for citizens (or national/local associations of citizens) to hold the government and other authorities to account for failing to meet their commitments and obligations, but these can focus on public reporting, parliamentary accountability or reference to the courts (which in turn raises the questions of at whose instigation, to which court(s) and leading to what remedies).

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<sup>27</sup> See UKELA paper - <https://www.ukela.org/content/doclib/317.pdf>



## **Annexes**

### **Annex 1**

#### **Scoping Paper from SG, December 2017**

#### **Future Options for Environmental Governance in Scotland – Request for advice from the Roundtable on Environment and Climate Change**

##### **Background**

On leaving the EU, it is the UK Government's intention to no longer be subject to the European Court of Justice (CJEU). The UK will also no longer be subject to the oversight, monitoring and reporting functions of the European Commission.

In terms of environmental oversight, the functions of these bodies have played an important role in ensuring the effective and consistent implementation of environmental legislation and the maintenance of environmental standards across the EU.

The Scottish Government is committed to maintaining and where appropriate enhancing current environmental standards and protection. Regulatory structures necessary to implement and enforce environmental standards in Scotland are already in place and working well. Requirements are currently being met either by Scottish institutions (for example the Scottish Environment Protection Agency) or through the current UK regulatory regime (for example the Health and Safety Executive). Regardless of the UK's future relationship with Europe, the Scottish Government and its agencies will continue to monitor and enforce environmental legislation, as we currently do under existing domestic powers.

##### **Purpose**

It is important that the public can feel confident that environmental legislation will continue to be effectively and consistently implemented and that environmental standards will continue to be upheld. It is also important that the public are confident that they can access accurate information on the level of achievement of such implementation and standards. Such information is also likely to be necessary to demonstrate our contribution to the fulfilment of international obligations through treaties and agreements.

As part of the process of preparing for the UK's possible exit from the EU, the Scottish Government is carefully considering whether any gaps could arise in existing domestic monitoring and enforcement powers that would need to be addressed to ensure Scotland maintains high standards of environmental protection.

Any new arrangements, if needed, should be designed to fit Scottish circumstances and current processes for monitoring, reporting and lines of accountability within Scotland and at the international level. Within Scotland, these should include existing statutory duties and current and potential future

levels of parliamentary scrutiny (including the public petitions procedures) and the judicial process (such as access to judicial review) and should take account of existing functions such as those of the Public Sector Ombudsman, Audit Scotland and the Information Commissioner.

Recommendations should take account of both marine and terrestrial environments and any differences in governance regimes between the two.

### **The ask**

The Roundtable are, therefore, asked to consider and provide advice in response to the following questions:

1. What potential gaps may arise, if any, in existing powers to monitor and enforce environmental standards in Scotland, should the UK exit the EU on terms which result in the loss of oversight of the CJEU and the European Commission?
2. Where gaps are identified, what options are there for providing appropriate levels of scrutiny, reporting and accountability in Scotland on environmental matters?

### **For each option proposed, please identify:**

- a. The international comparators that have been considered in developing the option;
- b. Any adjustments that would be required to the powers and functions of existing bodies to address identified gaps;
- c. If any options have been identified that cannot be implemented through changes to the powers and functions of existing bodies and a new body is proposed, please set out clearly its proposed scope and powers; and
- d. The way in which arrangements within the option proposed at a Scottish level might relate to the fulfilment of international commitments.

### **Outputs and timescales**

The Round Table are asked to provide a written report on these matters by 17 March. This report will initially be treated as advice to Ministers but the Round Table should expect that it will be published when Ministers have had the opportunity to consider it and agree a way forward.

The Round Table may be asked for oral updates and are welcome to provide interim comments or advice at any stage.

### **Arrangements**

The Round Table may choose to progress this work through establishing a sub-group and may wish to consider co-opting individuals to provide additional expertise. The names of any individuals proposed for co-option should be discussed and agreed with Scottish Government. Ian Jardine will act as the main contact point within Scottish Government and would be happy to attend any meetings of the Round Table (or a subgroup).

## Annex 2 Bibliography

<b>Date Published</b>	<b>Title</b>	<b>Author</b>	<b>Link</b>
<b>September 2016</b>	Study to assess the benefits detailed through the enforcement of EU Environmental Legislation	Prepared by Milieu Ltd. for the European Commission	<a href="#">Milieu Ltd / EC Report 09/16</a>
<b>December 2016</b>	The implications of Brexit for environmental law in Scotland	Scottish Universities Legal Network on Europe	<a href="#">SULNE 12/16 Report</a>
<b>July 2017</b>	Brexit and Environmental Law - Enforcement and Political Accountability Issues	UKELA	<a href="#">UKELA 07/17 Report - Enforcement</a>
<b>July 2017</b>	Monitoring the application of EU Law – 2016 Annual Report	European Commission	<a href="#">EC 07/17 - 2016 Annual Report</a>
<b>July 2017</b>	Monitoring the application of EU Law – UK Factsheet	European Commission	<a href="#">EC 07/17 - 2016 UK Factsheet</a>
<b>July 2017</b>	Brexit and Environmental Law - Exit from the Euratom Treaty and its Environmental Implications	UKELA	<a href="#">UKELA 07/17 Report - Euratom</a>
<b>August 2017</b>	The Governance Gap: why Brexit could weaken environmental protections	Greener UK	<a href="#">Greener UK 08/17 Report</a>
<b>September 2017</b>	Brexit and Environmental Law - Brexit, Henry VIII Clauses and Environmental Law	UKELA	<a href="#">UKELA 09/17 Report - Henry VIII</a>
<b>September 2017</b>	Brexit and Environmental Law - The UK and International Environmental Law after Brexit	UKELA	<a href="#">UKELA 09/17 Report - International Law</a>
	Scottish Annex	UKELA	Unpublished

<b>October 2017</b>	Ensuring compliance with environmental obligations through a future UK-EU relationship	Institute for European Environmental Policy and Client Earth	<a href="#">IEEL/ClientEarth 10/17 Paper</a>
<b>November 2017</b>	Environmental Accountability of Government after Brexit	Maria Lee, Professor of Law and Vice-Dean at the UCL Faculty of Laws	<a href="#">Prof. Maria Lee 11/17 Paper</a>
<b>January 2018</b>	Brexit and Environmental Law - The UK and European Cooperation Bodies	UKELA	<a href="#">UKELA 01/18 Paper - Euro. Co-op Bodies</a>
<b>January 2018</b>	Opportunities for strengthening enforcement of environmental laws in Scotland.	RSPB Scotland	Unpublished.
<b>January 2018</b>	The ECCLR Committee's work in relation to Europe and the EU.	<ul style="list-style-type: none"> <li>•Prof. Gavin Little</li> <li>•Prof. Colin Reid</li> <li>•Dr. Annalisa Savaresi</li> <li>•NFUS</li> <li>•RSPB</li> <li>•Scottish Environment Link</li> </ul>	<a href="#">ECCLR Written Submissions</a>
<b>February 2018</b>	Brexit and Environmental Law - Environmental Standard Setting after Brexit	UKELA	<a href="#">UKELA 02/18 Report - Environmental Standards</a>

### Annex 3

EU environmental oversight, scrutiny and enforcement functions	What is left after leaving the EU ?	Relevant existing arrangements if we leave the EU	Potential Gaps	Options to address any gaps
<p><b>Monitoring, measuring and reporting: Reporting environmental data (State of the Environment)</b></p>	<p>The UK will still be required to report under a range of international agreements and conventions. Where this is currently done through the EU, the UK will need to do this on its own. Public bodies will continue to have a range of monitoring and reporting duties. As a matter of policy, and in some cases legal requirement, Ministers and other public</p>	<p>Where the UK provides reports directly to international bodies other than the EU, this will continue. Much of the information is already gathered and co-ordinated at UK level through NDPBs, research bodies and other parts of government.</p>	<p>Being able to use EU systems to facilitate reporting and be part of developing methodologies.</p> <p>Ability to aggregate data at European level and assess UK progress and contribution on a comparative basis.</p> <p>Access to wider expertise, systems and data and knowledge holdings.</p> <p>Potential loss of</p>	<p>Seek continued engagement with appropriate EU expert institutions (such as the European Environment Agency, EURATOM, ECHA, IMPEL etc).</p> <p>Longer term, a review of monitoring and reporting duties across the sector could help to clarify, simplify and improve transparency about what is collected and published, by whom and for what purpose. (May</p>

	<p>authorities may wish to publish environmental information presently reported to the EU.</p>		<p>requirements for data to be published (depending on EU withdrawal legislation).</p>	<p>need legislation to adjust duties.  A single body (existing or new) could be given an overarching role in assessing and reporting on data about the state of the environment.</p>
<p><b>Monitoring, measuring and reporting: Reporting on the implementation of environment law (Is the law in place and working?)</b></p>	<p>The UK will no longer be required to report to the European Commission on the implementation and effectiveness of applying environmental laws. There are existing duties at Scottish level to report on implementation (e.g. Section of the Regulatory Reform (Scotland) Act 2014. Continuing to publish other information currently sent to the EU will be a matter of policy</p>	<p>Much of this information is already gathered and co-ordinated at UK level through NDPBs, research bodies and other parts of government.  There will continue to be Parliamentary scrutiny of legislation. It is suggested it has previously been challenging for Parliamentary Committees to find time to fulfill this role fully.</p>	<p>As above, plus:  Loss of EU pressure to improve quality and timeliness of reporting.  Sufficient capacity and expertise to scrutinise the effectiveness of existing legislation.</p>	<p>Policy commitment or legal obligation to continue to prepare and publish reports on the implementation of environmental laws.</p>

	and choice.			
<b>Scrutinising of reports, preparation of independent assessments and reports, examining environmental compliance and progress</b>	<p>The UK will no longer be subject to EU mechanisms scrutinising the transposition and proper implementation of EU law.</p> <p>Without a supranational structure, scrutiny will be for civil society and the Scottish Parliament.</p>	<p>A number of bodies within Scotland in both the public sector and civil society have a role in scrutinising environmental performance, not least the Parliament itself usually through its committees. Bodies such as Audit Scotland produce specialist reports and assessments.</p>	<p>EU mechanisms provide a strong external check on a Member State's performance in fulfilling environmental obligations.</p>	<p>It could be left largely to civil society, through academic and research bodies, NGOs, professional and expert bodies to scrutinise and comment on performance and these could be used by Parliamentary Committees to challenge Ministers.</p> <p>Ministers could establish an expert panel to provide additional and cross-cutting advice.</p> <p>The powers of NDPBs, such as SEPA and SNH, could be expanded to give them a more explicit role and new duties to assess performance against environmental</p>

				<p>duties across Government, although this raises issues about who scrutinises their own regulatory performance.</p> <p>Existing public bodies which already have a role in scrutinising and reporting on performance, such as Audit Scotland could be given additional duties in relation to the environment. This raises questions about expertise and the overall balance of such a body's remit.</p> <p>A new independent statutory body such as an 'Office of environmental scrutiny and audit' could be established, reporting</p>
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				directly to Parliament.
<b>Initiation of investigations, cross cutting studies and reports</b>	<p>Many bodies have powers and capacity to conduct studies and investigations as part of their wider functions in presenting and analysing information on performance and which can be used in calling the public sector to account.</p> <p>Similarly the Parliament can conduct inquiries on its own initiative.</p>	<p>As with the last section many bodies both in the public sector, academic world and civil society can and no doubt will undertake such work.</p> <p>The Parliament and bodies such as Audit Scotland can conduct inquiries into performance.</p>	<p>Reports arise in an ad hoc and unsystematic way. The status (and independence / objectivity) of such studies is variable and Government may not be required or obliged to respond in the way they are when the European Commission are the instigators. To fill the EU role, a body or bodies would need powers to initiate investigations, obtain information and require a response.</p>	<p>The task of initiating investigations, obtaining information and requiring a response, could be attributed to one of the bodies indicated above.</p> <p>However, if a power to require the provision of information is needed with penalties for failing to do so – which seems likely – this could only be given to a public authority.</p>
<b>Mechanisms for individuals or organisations to make complaints regarding the application of (non-criminal) environmental</b>	<p>Citizens will retain general rights to register a complaint and to challenge the actions of Government and public bodies.</p>	<p>There are mechanisms for individuals and organisations to complain about the delivery activities of environmental authorities to those authorities, through their elected</p>	<p>Elected representatives may require expert and independent advice in order to reach conclusions on environmental matters and in order to pursue complaints with</p>	<p>Additional powers could be given to an existing body to consider complaints from the public and to require compliance from public authorities.</p> <p>However, none of the</p>

law

representatives , including the petitioning of Parliament or to the Scottish Public Sector Ombudsman (SPSO).

Government.  
Ombudsmen are not specifically focused on environmental issues and may not have the technical expertise for complex environmental issues.

Existing mechanisms (e.g. ombudsman) tend to be focused on assessing whether proper and legal process has been followed rather than on the merits of any complaint.

existing bodies possess both the expertise and independence to consider complaints as to whether intended environmental outcomes are being achieved.

A new body could be created either to report to Parliament directly or to advise a body such as SPSO with an expanded remit. This body would also require powers to require a response or remedies from public sector bodies.

<p><b>Formal and informal mechanisms to seek solutions to concerns about the implementation of environmental law, through interaction with Government</b></p>	<p>Public bodies will continue to be required to have established complaints procedures which also include commitments to fully investigate and respond to complaints about their performance. This response often involved seeking a resolution.</p> <p>Government itself, with the engagement of Parliament, will often seek to resolve public concerns.</p>	<p>Bodies such as the Parliamentary Committees have powers of investigation and to obtain information. The Ombudsman can only exercise these powers where certain conditions around the complaints are met, but does not usually seek a solution through negotiation, although it will recommend changes to procedure and practice.</p>	<p>There is no current body charged explicitly with seeking to resolve issues of compliance and to pursue remedies in the way the European Commission currently does.</p> <p>Many issues raised with the European Commission (through monitoring or complaints) are resolved quickly and informally, but influenced by the pressure of more formal processes in the background.</p>	<p>This role can be added to the remit of whichever body is charged with investigating questions of compliance. See above.</p> <p>Alternatively, existing bodies could be left with the monitoring roles and can receive complaints to another body to seek resolution of compliance issues.</p>
<p><b>Powers to refer a public body to a court for alleged failure to implement environmental law in order to</b></p>	<p>There is an existing legal framework covering judicial review, appeals and other civil action.</p> <p>There are a number of Scots private law actions</p>	<p>There are a number of public and private law actions that individuals can take where public bodies are not complying with the law, which would</p>	<p>There is no body specifically charged with referring a public body to court where there is evidence that the body has failed to fulfill its duties on the</p>	<p>It would be possible to rely on existing mechanisms of judicial review but this would mean a re-consideration of their scope.</p>

<p><b>seek a remedy</b></p>	<p>that deal with the situation where loss has been suffered as a result of breaches of public law powers. These include breach of statutory duties, misfeasance in public office and commission of another recognised civil wrong such as negligence. It is also possible to attach a damages claim to a judicial review action but such claims are usually vindicatory rather than compensatory.</p>	<p>apply to retained EU law.</p> <p>The main current mechanism is judicial review which is based only on a challenge to the legality or reasonableness of an action by a public body.</p>	<p>environment, or failed to deliver an outcome commitment.</p> <p>Existing rules on standing and costs may deter private parties and NGOs from pursuing judicial review.</p> <p>Scots law remedies do not have the same scope as those provided by EU law. The nature of many EU obligations in requiring the strict achievement of standards and targets would, if replicated, require the courts to pay more attention to substantive outcomes rather than process and procedure.</p>	<p>However, a reference to court should be a final recourse when all other methods of enforcement have failed. It is hard to envisage that an existing public body such as SEPA or SNH could refer itself to a court. However, if a new public authority is created, evidence of a failure on the part of another public body could be submitted or referred to a court as an option of last resort.</p> <p>The issues of whether it is appropriate for the judicial system to consider issues of outcome/merit rather than process and procedure, and whether there would be relevant expertise and capacity</p>
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				<p>would need to be explored further. This could include consideration as to whether an environmental court or tribunal should be established.</p>
<p><b>Powers to order interim measures to prevent irreversible damage before judgment is handed down</b></p>	<p>Courts and public bodies have a range of interim powers to stop activities that breach environmental laws, normally subject to appeal.</p>	<p>Courts can grant interim interdict to halt developments until a full judgment is reached.</p> <p>There is some concern that these may be rarely invoked because the party seeking this may be liable for the losses suffered by the other part if the contested action/decision which has been stopped is held at the full hearing to be lawful.</p> <p>There are powers</p>	<p>Although current powers to issue interim measures will continue, this is a widely recognised area of weakness.</p> <p>The CJEU has in principle provided a backstop where Member states appear to have breached EU law but in practice its powers have been rarely exercised.</p>	<p>The range of powers within regulatory schemes to suspend decisions/action could be reviewed, as could the procedures in the courts to ensure that there are practical and effective means of intervention pending the final resolution of cases, and of securing remedies where required.</p>

		<p>available to public bodies to halt harmful activities such as Nature Conservation Orders and Land Management Orders which are usually open to an appeal process.</p>		
<p><b>Powers to require Government to take such action as is necessary to bring it into compliance and to impose sanctions if action is not taken (including fines)</b></p>	<p>On leaving the EU, no equivalent to the role exercised by the CJEU will apply.</p>	<p>Courts can quash decisions in certain circumstances and grant financial compensation where there is an identifiable loss to a private interest.</p> <p>The appropriate remedies, beyond declarator, are less clear where the finding is that the government has, for example, failed to meet broader air or water quality targets.</p>	<p>The powers of Scottish Courts are more limited than those of CJEU and public interests such as the environment are not compensated.</p>	<p>Political and policy accountability through Parliament or legal accountability through the courts would remain the main routes to sanction government.</p> <p>Should a body within Scotland be given powers to impose sanctions (or seek sanctions via a court), the nature of these sanctions could include financial and/or disciplinary measures</p>

				<p>affecting those responsible.</p> <p>However, there is limited merit in one public body issuing financial sanctions against another, as this essentially limits resources of government or NDPBs to carrying out functions and otherwise ensuring compliance with environmental law. Thus, the sanctions available must be environmentally-focused – that is, an order to take or quash a decision, or to deliver appropriate management.</p>
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