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## UK ENVIRONMENT BILL

Dear Gillian,

Thank you for your letter of 13 May about the Environment, Climate Change and Land Reform Committee's consideration of the implications of the UK Environment Bill for the environment in Scotland and on devolved competence. I address the questions that you raise in the enclosed annex.

You will be aware that the Legislative Consent Memorandum for the UK Environment Bill was tabled on the 27 May. This memorandum sets out that there are elements of the Bill concerning future alignment with EU standards, which do not require legislative consent, where the Scottish Government has a clear different policy position from the UK Government. We are not endorsing these positions by advancing the Bill for legislative consent. However, there are elements of the Bill where there are considerable practical advantages from providing for UK-wide arrangements and the power for UK Ministers to make UK Regulations, subject to the consent of Scottish Ministers. These are the elements that require legislative consent and we are recommending that the Parliament gives consent to the Bill on this basis.

We are considering this Bill against the background of the Covid-19 crisis, and as you know the Scottish Government's priority at this time is to respond to that crisis. However, we understand that the UK Government will continue to progress this Bill through the Westminster Parliament in due course. We therefore have to progress our consideration, and I am grateful for the Committee's detailed attention to this Bill.

Yours sincerely,

**ROSEANNA CUNNINGHAM**



## Annex: Questions from the ECCLR Committee on the UK Environment Bill

**1. Whilst much of environment policy falls within devolved competence, we are interested in the extent to which constraints such as trade rules/agreements, UK internal market forces, common frameworks and the replacement of EU funding, will affect Scottish Ministers' scope for policy divergence within the UK after the transition period ends. What is the Scottish Government's view on the impact of these possible constraints on its ability to make policy?**

This is a very broad question, which goes beyond the scope of the UK Environment Bill. The Scottish Government remains determined to preserve devolved competence in the face of Brexit. This determination informs all discussions with the UK Government on future arrangements. I am satisfied that the UK Environment Bill itself does not provide any constraints on devolved competence, but remain vigilant across the range of future arrangements that will be needed.

The Scottish Government has urged the UK Government to negotiate a two year extension to the current transition period. With so much government effort devoted to the Covid-19 crisis, this is the only possible common-sense decision.

Any trade agreement negotiated by the UK Government will impact across the Scottish economy. Therefore, the Scottish Government and Parliament need a guaranteed role at all stages of the process. The UK Government has repeatedly failed to take proper account of the opinions of the devolved administrations throughout the Brexit process.

The development of common frameworks remains in accordance with the principles agreed by JMC(EN) ministers in October 2017. These principles require that frameworks respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore: be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent; maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules; lead to a significant increase in decision-making powers for the devolved Administrations. For all frameworks, we will not accept any constraint on devolution that would prevent the Scottish Parliament and Scottish Ministers from making alternative arrangements in these areas where they are in Scotland's best interests.

**2. A list of all SIs made under the European Union (Withdrawal) Act 2018 which relate to the matters covered by this Bill that are within devolved competence, and the extent to which these SIs are superseded or amended by the Bill.**

The instruments made under the European Union (Withdrawal) Act 2018<sup>1</sup> are intended to fix 'deficiencies' in retained EU law so that it is able to operate as domestic law. The UK Environment Bill does not supersede those instruments, and the new powers in that Bill will so far as they enable the modification of retained EU law only apply to the deficiency fixed versions.

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<sup>1</sup> A list of SIs made under that Act can be found at <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments?subject%5B%5D=environment>

### **3. Information about how the legislative powers conferred on UK Ministers under this Bill would relate to any proposed common frameworks.**

Scottish Government officials continue to work together with UK Government and the other devolved administrations to develop common frameworks where they are in Scotland's interests, on the basis of consensus, and in line with the framework principles agreed by JMC(EN) in October 2017. Common Frameworks complement the legislative positions across the different UK Administrations. We will only agree to arrangements that recognise and preserve Scotland's devolved competence as a nation not a region, and that preserve our right to exercise those powers to protect and promote Scotland's needs and interests when Scotland fully leaves the EU legal framework with the UK, after the implementation period.

Agreement to the JMC(EN) principles on common frameworks was reached when all four UK administrations agreed that level playing field commitments should be maintained should the UK leave the EU. Any move away from these level playing field commitments has implications for the frameworks process because it widens the scope for policy divergence between administrations in different parts of the UK. This could have a detrimental impact on significant areas of devolved competence such as environmental protection, regulations around GM crops, marine policy and energy.

### **4. Are there any matters which are not dealt with by this Bill and which Scottish environmental or agricultural stakeholders, or the Scottish Government, want to see included?**

The Scottish Government is not seeking any additions to this Bill, and at the present time has not identified any additional provisions in this Bill that should be extended to Scotland.

### **5. What opportunities did the Scottish Government have to comment on the provisions of the legislation ahead of introduction?**

There were substantial contacts between the UK Government and the Scottish Government at official level on the detailed development of provisions on the areas of environmental regulation that were intended to extend to Scotland. Defra shared their developing thinking of many of the Chapter 1 measures that contain their future strategic environmental policy framework, and there were substantial discussions on the consequences for devolved competence. We were given very little notice of the UK Government's intention to introduce the provision at Clause 19 on statements about Bills containing new environmental law.

### **6. Where regulation making powers are conferred on Scottish Ministers in clauses 49, 50 and 125, the Bill provides that the power can only be used to make provision that would be within the legislative competence of the Scottish Parliament. This is not made explicit in other clauses in the Bill which confer regulation making powers on the Scottish Ministers. Is the Scottish Government aware of the reason for this approach?**

We do not believe that there is any significant reason for this difference in approach. For both resource efficiency and chemicals measures, the Bill covers a significant range of reserved and devolved matters, and this may be why the UK Government chose to make the limit to Scottish Ministers' regulation making powers explicit in these instances.

**7. How does the Scottish Government expect the implementation of the Act will be impacted by the current Covid-19 situation? For example, if some provisions are likely to be prioritised or delayed as a result of changes to government business and whether any areas of the Bill are seen as particularly relevant to a ‘green recovery’?**

A wide range of preparations for the end of the transition period are delayed because of the focus of effort on the Covid-19 crisis, which is why the Scottish Government has urged the UK Government to negotiate a two year extension.

There are likely to be delays to the implementation of many of the measures in the Bill, although that is largely a matter for the UK Government.

Continuing our progress towards a circular economy is an important element of a green recovery, and the measures in the Bill, for example those covering Extended Producer Responsibility, will make a contribution alongside our own initiatives, such as the deposit return scheme.

**Powers for the UK Government in devolved competence**

**8. The Bill confers significant new powers on UK Ministers to make subordinate legislation for Scotland in devolved areas of environmental law (clauses 47, 48, 50, 81, 84 and 125). What does the Scottish Government consider are the advantages and disadvantages, and the broader consequences for the devolution settlement, of this extension of UK Government powers within devolved competence?**

The Legislative Consent Memorandum was tabled on the 27 May, and sets out the Scottish Government’s reasons for seeking legislative consent to these measures. In all cases, the ability of the UK Ministers to make regulations with respect to devolved matters is subject to the consent of the Scottish Ministers. We do not, therefore, see this as having consequences for the devolution settlement.

**9. Where UK Ministers make subordinate legislation for Scotland in devolved areas of environmental law, there is no scrutiny role for the Scottish Parliament. What are the Scottish Government’s views on this?**

Officials from the Scottish Parliament and the Scottish Government are discussing a new protocol for scrutiny of Scottish Ministers’ consent to statutory instruments made by UK Ministers. These discussions while still ongoing are very close to a successful conclusion. The intention is that this protocol would apply to all instruments made by UK Ministers which legislate in devolved areas that are currently within the competence of the EU that include devolved provision, and as such would likely cover any such provisions in SIs made under powers in the UK Environment Bill

**10. Where the Bill gives the Secretary of State powers within devolved competence, what processes will be in place to ensure Scottish stakeholder interests will be taken into account?**

The ability of UK Ministers to make regulations with respect to devolved matters is subject to the consent of Scottish Ministers. We will expect that an appropriate level of consultation has been carried out, and Scottish stakeholder views to be taken into account.

**11. Where this Bill confers concurrent powers on Scottish Ministers and UK Ministers to make delegated legislation, what factors will the Scottish Ministers take into account in deciding whether to exercise the power themselves or to consent to UK Ministers exercising the power?**

The Scottish Government will consider its position on the appropriate use of powers to make delegated legislation on a case by case basis. In general, we will seek the most effective route for regulations, including in terms of environmental protection and enhancement, and advancing the interests of consumers and businesses in Scotland.

**Clauses 47 and 48/schedules 4 and 5 – Producer responsibility**

**12. To what extent would constraints such as trade rules/trade agreements and UK internal market forces affect Scottish Ministers' scope for policy divergence within the UK after the transition period ends?**

Waste, including producer responsibility, is a devolved policy area and Scottish Ministers retain the right to diverge from UK policy should we wish to do so. Given the stage of negotiations, we do not yet have sufficient information on the likely form of future trade agreements to make any meaningful assessment of the degree to which they could represent a constraint on devolved action. There are wider concerns about the UK Government's position on future trade policy, that are discussed briefly in the answer to question 69.

**In terms of UK Ministers making regulations in devolved competence under these provisions—**

**13. Does the Scottish Government consider it appropriate that these powers are shared by UK and Scottish Ministers within devolved competence?**

Producer responsibility remains devolved, although currently producer responsibility regulatory regimes operate on a UK-wide basis by agreement with the devolved governments. The provisions in the Bill enable Scottish Ministers to make relevant secondary legislation for Scotland. Where a UK Minister is making regulations for Scotland such legislation would require the consent of the Scottish Ministers before it could be made.

**14. In what circumstances does the Scottish Government envisage the power will be exercised by UK ministers?**

The power will only be exercisable by UK Ministers with regards to Scotland with the Scottish Ministers' consent. We anticipate the primary use of this power will be to create or amend UK-wide producer responsibility regimes where that has been agreed with the devolved governments.

**15. Does the Scottish Government intend to ask the UK Government to make regulations for Scotland under these provisions or does it intend to bring forward its own regulations?**

Scottish Ministers may ask UK Ministers to make regulations where a UK-wide approach makes most sense. Alternatively, Scottish Ministers can proceed with Scotland only regulations. Any future regulations will be individually judged, and the most appropriate approach taken.

**In relation to the power to direct compliance scheme operators, Schedule 4 paragraphs 6(1) and (2) give power to the Secretary of State and Scottish Ministers concurrently to give enforceable directions to the operator to ensure compatibility with international obligations—**

**16. How will the division of responsibility between the Secretary of State and Scottish Ministers in this regard be managed? What factors would determine whether it is the Secretary of State or the Scottish Ministers who should act in a particular case? How will the two administrations ensure they act consistently and without duplication of effort in relation to such directions?**

A judgement as to the best approach will be taken on a case by case basis. There are well established procedures for interaction between Scottish Ministers and the UK Government – reflecting the fact that producer responsibility regimes operate by agreement across the UK. We will maintain effective communication between administrations to ensure there is no duplication of effort.

**17. Why is Scottish Ministers' consent not a precondition of the Secretary of State issuing directions under these provisions in a devolved area?**

As noted above, the current approach to producer responsibility is largely managed at a UK level with agreement of the administrations. It, therefore, makes sense for the Secretary of State to be able to issue one direction for a compliance scheme as a whole, to give effect to an international obligation and within the bounds of the regulations. However, we recognise that this could be seen as being inconsistent with other provisions that explicitly require approval from Scottish Ministers, and we will consider this issue further.

**18. In relation to administration (schedule 5, paragraph 4), do Scottish Ministers expect a UK-wide administrator or that a different administrator would be appointed in Scotland? Who do Scottish Ministers intend will be the administrator?**

No decisions have yet been taken on this issue and it is a matter of ongoing dialogue between the governments.

**19. In relation to an enforcement authority (schedule 5, part 2), do Scottish Ministers expect a UK-wide scheme or that a different enforcement authority would be appointed in Scotland? Who do Scottish Ministers intend will be the enforcement authority?**

In general, SEPA generally carries out enforcement duties under producer responsibility regulations within Scotland and it is, therefore, likely that it would be responsible for enforcement in Scotland under future regulations. However, the design of the new provisions remains a work in progress at the present time.

**20. Will the provisions on producer responsibility, in the Scottish Government's view, enable 'keeping pace' with revisions to EU waste Directives and Regulations made under the EU Circular Economy Plan (CEP) and with future EU law in this area? Is it the Scottish Government's intention to ensure that any Regulations introduced in Scotland using these powers will keep pace with the EU CEP and would this be a condition of any consent being given to UK-wide regulations?**

The Scottish Government has committed to keeping pace with EU Directives and Regulations as far as possible, including those made under the CEP. The provisions in the UK Environment Bill match the ambition currently demonstrated by the CEP and we will look

to see that any Regulations introduced using these powers will deliver outcomes in line with the EU CEP, and meet our keeping pace objectives.

**21. How will the reforms introduced to producer responsibility address, or be used to address, criticisms of the current UK-wide packaging producer responsibility system by the 2018 review by the UK National Audit Office?**

The reforms to the Packaging Producer Responsibility obligations are intended to, amongst other things, increase transparency around flow of funds, direct more funding to support local authority collections, collect the full net cost of recovery from producers, and encourage more sustainable packaging design. It is also our ambition that they will lead to a greater proportion of waste being reprocessed domestically rather than exported. These measures will address the criticisms raised in the 2018 National Audit Office Report and concerns raised by stakeholders more generally.

**Clauses 49 and 50/schedules 6 and 7 – Resource efficiency**

**22. To what extent would constraints such as trade rules/agreements and UK internal market forces affect Scottish Ministers' scope for policy divergence within the UK after the transition period ends?**

Resource efficiency is a devolved area and Scottish Ministers retain the right to diverge from UK policy should we wish to do so. We do not yet have sufficient information on the likely form of future trade agreements to make any meaningful assessment of the degree to which they could represent a constraint on devolved action.

**In terms of UK Ministers making regulations within devolved competence under these provisions—**

**23. Does the Scottish Government consider it appropriate that these powers are shared by UK and Scottish Ministers within devolved competence?**

Resource efficiency remains devolved. The provisions enable Scottish Minister to make relevant secondary legislation for Scotland. Where a UK Minister is making regulations for Scotland such legislation would require the consent of the Scottish Ministers before it could be made.

**24. In what circumstances does the Scottish Government envisage the power will be exercised by UK ministers?**

The power will only be exercisable by UK Ministers with regards to Scotland with Scottish Ministers' consent. We anticipate the primary use of this power will be to create or amend UK-wide resource efficiency legislation where that has been agreed with the devolved governments.

**25. Does the Scottish Government intend to ask the UK Government to make regulations for Scotland under these provisions or does it intend to bring forward its own regulations?**

Scottish Ministers may ask UK Ministers to make regulations where a UK-wide approach makes most sense. Alternatively, Scottish Ministers can proceed with Scotland only regulations. Decisions about future regulations will be individually judged, and the most appropriate action taken.

**26. In relation to an enforcement authority (schedule 6, part 2), do Scottish Ministers expect a UK-wide scheme or that a different enforcement authority would be appointed in Scotland? Who do Scottish Ministers intend will be the enforcement authority?**

The Scottish Government does not have a specific enforcement authority in mind for Regulations that have not yet been made. In due course, as Regulations are made under these provisions, the Scottish Government will consider the best enforcement authority for the given Regulations.

**27. In relation to an enforcement authority (schedule 7, part 2), do Scottish Ministers expect a UK-wide scheme or that a different enforcement authority would be appointed in Scotland? Who do Scottish Ministers intend will be the enforcement authority?**

The Scottish Government does not have a specific enforcement authority in mind for Regulations that have not yet been made. In due course, as Regulations are made under these provisions, the Scottish Government will consider the best enforcement authority for the given Regulations.

**28. To what extent does the Scottish Government expect that any UK-wide Regulations would seek to keep pace with the EU Ecodesign Directive given statements made by the UK Government that it intends to meet or exceed EU CEP standards – and would a minimum of ‘keeping pace’ be required for Scottish Ministers to consent to UK-wide Regulations?**

The Scottish Government cannot predict the legislative intentions of UK Ministers. The current process, which requires Scottish Ministers’ consent in the event of UK-wide instrument being made under these powers, would allow the Scottish Ministers to refuse consent for their application in Scotland if we disagree with the approach.

**29. Would the provisions on resource efficiency, in the Scottish Government’s view, enable ‘keeping pace’ with revisions to EU waste Directives and Regulations made under the EU Circular Economy Plan (CEP), including current Ecodesign Regulations and the EU Ecodesign Directive and with future EU law in this area? Is it the Scottish Government’s intention to ensure that any Regulations introduced in Scotland using these powers will keep pace with the EU laws on ecodesign and would this be a condition of any consent being given to UK-wide regulations?**

The Scottish Government has committed to keeping pace with EU Directives and Regulations as far as possible, including those made under the CEP. The provisions in the Environment Bill match the ambition currently demonstrated by the CEP and we will look to see that any Regulations introduced using these powers will deliver outcomes in-line with the EU CEP and meet our keeping pace objectives..

**30. Does the Scottish Government have a view, and is it in agreement with the UK Government on, which waste streams should be subject to new EPR schemes? Is it still the intention of the Scottish Government to prioritise schemes for tyres, furniture and mattresses, as set out in its Circular Economy Strategy?**

The waste streams identified by the UK Government for new EPR schemes are broadly consistent with Scottish Government priorities, including mattresses and furniture (that are grouped under bulky waste) and tyres. The Scottish Government still considers these priority



waste streams to address, and in parallel to the UK Government's work Zero Waste Scotland is working with the National Bed Federation on a voluntary approach to mattress EPR.

**31. Is it possible the Scottish Government could use powers in the Bill to introduce additional EPR schemes to those going ahead on a UK-wide basis, or does the Scottish Government consider that all EPR schemes (beyond the Deposit Return Scheme) should be UK-wide?**

Waste, including producer responsibility, is a devolved issue. The Bill provides powers for Scottish Ministers to develop and implement separate schemes for Scotland where we see that as the most effective approach.

**Clauses 55, 60 and 61 – *Managing waste; waste enforcement and regulation*—**

**32. What was the policy intention behind the proposals for the electronic tracking of relevant waste and what role will SEPA play in the process?**

Currently, the movement of waste across the UK is recorded through a paper-based system of waste transfer notes. A new electronic system is currently being developed by DEFRA, with active participation from the Scottish Government and SEPA, as well as other Devolved Administrations and environmental regulators.

The Scottish Government's "Making Things Last" strategy set out Scotland's intention to move towards electronic waste management. SEPA has long highlighted the potential role of electronic waste tracking in reducing waste crime. Improvements in waste tracking information are also intended to support future policy development, providing more timely accurate data thereby enabling better regulation and better policy-making, and allowing improved tracking of progress towards the development of a more circular economy.

In October 2017, SEPA, Scottish Government and Zero Waste Scotland published a new Waste Data Strategy, which set out our commitment to work with others to support the development and delivery of electronic systems to capture data and track the movement of non-hazardous and hazardous waste and other materials.

Much of Scotland's waste is managed within Scotland but there are also significant movements of waste across the UK. There are therefore benefits from working with the other governments on a UK-wide system. While the regulation-making powers are separate, all administrations are working closely together on how the system will operate in practice.

Officials from DEFRA, the Environment Agency, SEPA, and the Devolved Administrations continue to work together to develop the basis for the specifications for such a system, and have consulted stakeholders to establish what their needs and expectations would be in respect of electronic waste tracking. Scoping work was completed in 2018 in preparation for procurement. SEPA are now playing a central role in the development, testing and potential roll out planning for the system.

**33. In new section 34CB (8), introduced by clause 55, why does the definition of 'enforcement authority' not include SEPA for Scotland?**

The introduction of the new section 34CB into the Environmental Protection Act 1990 allows provision to be made for enforcement of any new offences, including by means of civil sanctions. The definition in section 34CB(8) of enforcement authority does not currently

include SEPA, although the Explanatory Notes to clause 55 erroneously state that SEPA is included in the definition. It would be possible for Scottish Ministers under Part 3 of the Regulatory Reform (Scotland) Act 2014 to give SEPA the ability to impose civil sanctions, and therefore the provisions in section 34CB relating to civil sanctions need not necessarily include powers in relation to SEPA. However, the Scottish Government will seek clarity about this section of the Bill with the UK Government.

**34. In relation to the provisions in clause 55 on electronic waste tracking, what measures are, or will be, in place to support consultation and a co-ordinated approach?**

Officials from DEFRA, the Environment Agency, and the Devolved Administrations and environmental regulators have established a Waste Tracking Project Board as a forum for joint working to develop the basis for the specifications, and roll-out approach for such a system. The Board has consulted stakeholders to establish what their needs and expectations would be in respect of electronic waste tracking.

Officials from Scottish Government and SEPA will be discussing further measures to support ongoing stakeholder engagement as part of roll-out planning for Scotland.

**35. Again in relation to the provisions in clause 55, why does the Bill not empower the Secretary of State to make regulations on electronic waste tracking in Scotland with Scottish Ministers consent, as is the case for producer responsibility and resource efficiency clauses? Is there a reason why this policy area is treated differently?**

Much of Scotland's waste is managed within Scotland but there are also significant movements of waste across the UK. There are, therefore, significant benefits from working with the other governments on a UK-wide waste tracking system, but the statutory requirements in relation to waste collection and disposal which apply to waste operators are currently different across the different parts of the UK. While current legislation on waste as well as the new regulation-making powers on waste tracking are separate, all administrations are working closely together on how a waste tracking system will operate in practice.

Any regulations made under the power would allow the Scottish Government and SEPA to access and separate out Scotland only data i.e. the powers must enable Scottish Ministers to gather and aggregate data etc. from the tracking system on a Scotland only basis. The powers would also enable us to transpose the electronic tracking system requirement of the European Commission's Circular Economy Package.

The provisions are drafted so that Scottish Ministers are able to develop, maintain or host an electronic system. Alternatively the provisions would allow the administrations to collaborate to establish a UK wide system. The Scottish Ministers would also have power to establish a special purpose vehicle or community interest body for these purposes to allow industry to develop, maintain or host an electronic system. We are satisfied that, although separate Regulations will be made for different parts of the UK, they will still allow for co-operation on a UK-wide system as appropriate.

**36. Does the Scottish Government have a position on which waste streams should be required to participate in digital waste tracking?**

No final position has been taken on which waste streams will be included in digital waste tracking. SEPA are playing a central role in the development of the system, and have begun scoping requirements and approach to the roll out of the system. As part of this process,

scoping of waste streams under consideration for inclusion in the tracking system has begun, in tandem with other UK environmental regulators.

**37. Will the provisions on waste tracking, in the Scottish Government's view, enable 'keeping pace' with revisions to EU waste Directives made under the EU Circular Economy Plan (CEP) and with future EU law in this area? Is it the Scottish Government's intention to ensure that any Regulations introduced in Scotland using these powers will keep pace with EU law on waste tracking?**

It is the view of the Scottish Government that the waste tracking provisions ensure the necessary powers to enable us to transpose the electronic tracking system requirement of the European Commission's Circular Economy Package.

The Scottish Government has committed to keeping pace with EU Directives and Regulations as far as possible..

**Clause 69 and schedule 11 – Air quality**

**38. What would be the impact of clause 69 and schedule 11 on devolved policy, if any?**

The purpose of clause 69 is to refer to the provisions set out in schedule 11. Of these provisions, only one is relevant to devolved policy i.e. paragraph 2 - the requirement to review the national (UK) air quality strategy within twelve months of the legislation coming into force and then every five years. In current legislation there are no time periods prescribed for review.

**39. What measures will be in place to support a co-ordinated approach between the UK and Scottish governments?**

The UK air quality strategy has been in place since 1997 and there are well established procedures for co-ordinating joint working between the UK administrations. The legislation has no implications for these procedures.

**40. Given UK law on air quality will no longer be underpinned by EU law, does this have implications for how the UK national air quality strategy may be used in future and how does that relate to the development of any common framework on air quality?**

We are not aware of any current implications of EU exit for use of the UK air quality strategy. Requirements of EU air quality legislation will be maintained in the UK after EU exit. A common framework on air quality would cover the procedures referred to in the response to question 39.

**41. Does the Scottish Government have any plans to introduce equivalent or similar changes to local air quality management governance as those introduced in the Bill for local authorities in England, for example in response to the recent independent review of Scotland's air quality strategy?**

A new Scottish air quality strategy is currently in preparation, taking into account the conclusions and recommendations arising from the independent review of the current Cleaner Air for Scotland strategy. Updates on progress will be issued as necessary.

**42. Could you confirm that it is not intended that a Scottish public body could be a “relevant public authority” or an “air quality partner” for the purposes of the provisions inserted by paragraphs 4 and 5 and 8 of schedule 11?**

Paragraphs 4, 5 and 8 of schedule 11 refer to England only, therefore it is not intended that a Scottish public body could be a ‘relevant public authority’ or an ‘air quality partner’.

**Clause 81 – Water quality**

**43. Does the Scottish Government consider that clause 81 respects the usual division of responsibility (since devolution) between the UK and Scottish Government in relation to the regulation of cross border river basins?**

The Scottish Government considers that it does. The protection of the water environment in Scotland is devolved. However, there are 2 cross-border river basin districts which are situated partly in Scotland and partly in England, and existing UK regulations made under section 2(2) of the European Communities Act 1972 (with some small exceptions) apply to those districts as a whole.

The Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 (the “ST Regulations”) apply in respect of the Solway Tweed River Basin District. The ST Regulations provide for functions in respect of the district to be exercised jointly by the Secretary of State and the Scottish Ministers, and by SEPA and the Environment Agency. For example, SEPA and the Environment Agency are responsible for reviewing and updating the river basin management plan on a 6 yearly basis. The Scottish Ministers and the Secretary of State are responsible for approval of the river basin management plans.

The Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003 (the “Northumbria Regulations”) apply to the Northumbria River Basin District. As the Northumbria River Basin District is primarily in England, and only a very small part with no water bodies lies in Scotland, the Northumbria Regulations provide for most of the functions in relation to the district to be carried out by the Secretary of State or the Environment Agency.

As a result of the ST Regulations and the Northumbria Regulations putting in place arrangements which apply to those river basin districts as a whole, clause 81 enables the Secretary of State to make updates to them, as the starting point is that any updates are normally likely to be required to be made in respect of the district as a whole, and therefore apply to both the Scottish and English parts. The devolved competence for the Scottish parts of the river basin districts is respected, as any changes which apply to the Scottish parts can only be made with the Scottish Ministers’ consent.

**44. Under the Bill as presently drafted, the Scottish Parliament will not have the power to approve/annul regulations concerning devolved matters which are made under clause 81 in relation to those parts of cross border river basins that lie within Scotland. The regulations would be scrutinised only at Westminster. Does the Scottish Government consider this is appropriate?**

This reflects that there are existing UK regulations which apply to both the Scottish and the English parts of the cross-border river basin districts. Those regulations put in place arrangements in relation to river basin management planning, in respect of each cross-border river basin district as a whole, as further described in the response to question 43. Therefore, to update the cross-border arrangements as they apply to the districts as a whole,

the UK Government would need to make the regulations under clause 81 at Westminster, as it would not be within the competence of the Scottish Parliament to do so. Such regulations can only be made with the Scottish Ministers' consent.

**45. Where the original regulation-making power does not require Scottish Ministers' consent, the Secretary of State is required only to consult Scottish Ministers – could you identify the relevant regulatory powers which *do not* require Scottish Ministers' consent?**

The Secretary of State is required to obtain the Scottish Ministers' consent to regulations under clause 81(5) which apply to the Scottish part of the cross-border river basin districts. If the Secretary of State makes regulations under clause 81 which apply to the English part of the cross-border river basin district only, the Secretary of State would not need the Scottish Ministers' consent, but pursuant to clause 81(6)(c) would be required to consult the Scottish Ministers prior to making those regulations.

**46. Do Scottish Ministers already have a power (equivalent to that in clause 81 of the Bill in respect of the Secretary of State), to make regulations to make provision about the substances to be taken into account in assessing the chemical status of surface water or groundwater (and levels of those substances)? If not, would this fall under the general keeping pace power expected in the forthcoming Continuity Bill?**

We understand that the EU may decide to amend the Priority Substances Directive (Directive 2008/105/EC) in the next couple of years, although we are not yet aware of any firm proposals or timings for this. It is anticipated that clause 81 could be used to make changes required to give effect to future updates to the Priority Substances Directive for the cross-border river basin districts.

When S2(2) of the European Communities Act 1972 is no longer available, Scottish Ministers do not have another existing regulation-making power to implement future amendments to the Priority Substances Directive for the rest of Scotland. As identified in the question, we will introduce a Continuity Bill that will provide the ability to keep pace with EU law in areas of devolved competence.

**Clauses 84 and 85 – *Solway Tweed river basin district (STRBD)***

**47. Clause 84 confers power on the Secretary of State (with Scottish Ministers' consent) to amend the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004. This power could be used to reallocate functions (including regulation-making functions) between the UK and Scottish Ministers in relation to the STRBD. What is the reason for this provision? Could the Scottish Government provide examples of the types of changes, to which the Scottish Government would consent, that this power might be used to make?**

The purpose of the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 was to enable the extent of the cross-border river basin district to be defined geographically, and to provide that certain, predominantly administrative, functions should be jointly exercised for the district as a whole. In practice this has worked well to date, as both UK and Scottish Ministers have had a similar and shared interest in the protection and improvement of these cross-border rivers.

Post EU Exit however, it seems possible that UK Ministers may opt a) not to keep pace with any new EU standards, or b) to diverge from existing EU standards. Therefore, these clauses, which we requested, are intended to protect Scottish Ministers' interests in the

associated functions of setting standards and objectives in the Scottish part of the STRBD, so that these may be consistent with Scottish Ministers' approach in the rest of Scotland.

The intention of this power is to allow for the joint functions under the existing ST Regulations to become functions which are exercisable by the Secretary of State alone in relation to the English part and by the Scottish Ministers alone in the Scottish part, so that Scottish Ministers may choose to keep pace with new EU standards in the Scottish part of STRBD, even if UK Ministers choose not to do so in England.

**48. Similarly, clause 84 confers power on the Secretary of State (with Scottish Ministers' consent) to change the reassignment between SEPA and the Environment Agency of their functions under the 2004 Regulations in relation to the STRBD. What is the reason for this provision? Could the Scottish Government provide examples of the types of changes, to which the Scottish Government would consent, that this power might be used to make?**

The provision at clause 84(4) complements the provisions at 84(3) and is there to ensure that the provisions as a whole are flexible to allow the implementation any future policy intention agreed between the UK Government and the Scottish Government as to the allocation of functions.

**49. At present, (under part 1 of the Water Environment and Water Services (Scotland) Act 2003, as applied, with modifications, by the 2004 Regulations), Scottish Ministers have powers to make regulations for the Scottish part of the STRBD. The power in clause 84 could be used to change this, by UK statutory instrument at Westminster with no power for the Scottish Parliament to approve/annul it. Does the Scottish Government consider that it would be more appropriate for such legislation to be laid before (or also before) the Scottish Parliament for the parts of the STRBD which lie in Scotland?**

Scottish Ministers have the powers to make regulations on a range of matters in relation to the STRBD, including, most importantly, on the measures to control impacts on the water environment under section 20 of the WEWS (Scotland) Act. There is no intention for this to change, and if such a change were proposed by UK Ministers, then Scottish Ministers are unlikely to consent to this. We consider that the consent requirement at clause 84(7) is adequate to protect Scottish Ministers' interests in this matter.

**50. Does the Scottish Government consider that this clause has the effect of enabling changes to the current devolution settlement (as regards responsibility for environmental regulation in the Scottish areas of the STRBD) to be made by negative instrument at Westminster and does the Scottish Government consider this appropriate?**

This clause does not enable any change to the current devolution settlement. Protection of the water environment is devolved, and as noted above, these particular provisions are intended to preserve Scottish Ministers' interests in the Scottish part of the STRBD. We consider that the consent requirement at clause 84(7) is adequate to protect Scottish Ministers' interests in this matter.

**51. What processes are either in place, or will be put in place, to assist the Secretary of State and Scottish Ministers (and where relevant, the Environment Agency and SEPA) to work together when exercising a function relating to the STRBD?**

The ST regulations already require the Secretary of State, the Scottish Ministers, and the respective agencies to work together in exercising certain joint functions, such as developing a River Basin Management Plan for the STRBD.

There are joint SEPA/EA working groups in place, and joint stakeholder advisory groups already operate in the STRBD. Scottish Government officials meet regularly with Defra to discuss progress on the delivery of river basin plans generally, including in the STRBD – indeed it was through that forum that these provisions were developed. We do not envisage a need for any additional processes as a result of these provisions. SG officials will work with Defra officials to develop the regulations made possible by these provisions.

**Clause 125 – REACH**

**52. Do the Scottish Ministers have existing powers that would enable them, by subordinate legislation, to amend the REACH Regulation (equivalent to the power conferred on UK Ministers by paragraph 1 of Schedule 19)? If not, would be appropriate for Scottish Ministers to be given such powers?**

Scottish Ministers do not have any equivalent power to the power conferred on UK Ministers by paragraph 1 of Schedule 19 to amend the REACH Regulation by subordinate legislation. Scottish Ministers have agreed, with the Committee's consent, to a number of REACH EU Exit SIs which provide for a replacement UK-wide system that replicates the EU system as far as is possible. Paragraph 3 of Schedule 19 of the Bill requires the consent of Scottish Ministers where amendments are made to the REACH Regulation which are within devolved competence.

**53. Do the Scottish Ministers consider that the requirement in paragraph 4 is sufficient, that UK Ministers “consider” a request by Scottish Ministers that UK Ministers make regulations under this Schedule?**

Yes. Should UK Ministers decide not to take forward a request, Scottish Ministers would be able to fall back on the safeguarding provisions within UK REACH which would allow us to take provisional action for Scotland.

**54. Is the Scottish Government satisfied with the scope of the protected provisions in the REACH Schedule – do these provide sufficient protections to ensure that a UK-wide chemicals regulation system will guarantee high levels of protection for human health and the environment?**

Yes. Article 1 of the REACH Regulation is one of the protected provisions, and it clearly sets out the aim and purpose of the REACH Regulation. Article 1(1) states “The purpose of this Regulation is to ensure a high level of protection of human health and the environment”.

**55. Is the Scottish Government’s position still that the UK should seek membership of EU REACH post EU-exit, and are those representations being made to the UK Government in respect of the UK negotiations with the EU? Does that position impact on the Scottish Government’s consideration of whether or not to consent to these provisions of the Bill?**

Yes, the Scottish Government position is that the UK should seek to retain continued membership and participation in EU REACH, the work of the European Chemicals Agency (ECHA) and alignment with other associated EU chemical regulations. This is also the preferred position of the chemicals industry and is in line with our assessment of other stakeholder views, so has been a consistent theme of our discussions with the UK Government. The UK Government published its approach to negotiations in February this year which referenced a specific annex on chemicals, a draft of which was published on 19 May, which included the objective “to ensure high levels of protection for the environment and human and animal health”. The draft is silent on the possibility of continued participation in ECHA. These provisions are necessary to ensure a functioning UK wide Chemicals regime.

**56. On 29 October 2019, the Cabinet Secretary told the Committee that the “UK Environment Bill would remove powers previously available to the Scottish Ministers, so that is an area that we want to work on”. What are these powers that are being removed by the Bill and what is the Scottish Government’s current position on this?**

When this answer was provided to the Committee on 29 October 2019, it was in regard to a previous version of the Environment Bill which had been introduced on 15 October 2019. That Bill, however, fell as a result of the dissolution of the UK Parliament for the General Election which was held on 12 December. The Environment Bill which was introduced in January 2020 contains amended provisions on REACH in Schedule 19. In the October 2019 version of the Bill, only the Secretary of State had the power to amend the REACH Enforcement Regulations 2008 (the “REACH Enforcement Regulations”). Paragraph 2 of Schedule 19 of the Bill now ensures that the REACH Enforcement Regulation can be amended by the Secretary of State and by the relevant devolved authority.

This issue has, therefore, been fully resolved and no powers of the Scottish Ministers will be lost.

**Part 1, chapter 1 – Improving the natural environment**

**57. To what extent do Scottish Ministers expect the environmental targets, plans and policies (including principles) set out in part 1, chapter 1, to act as a practical constraint on their ability to exercise powers within devolved competence?**

The provisions in part 1, chapter 1, with the exception of clause 19 (statements about Bills containing new environmental law) do not extend to Scotland.

Clause 19 would be relevant where provisions extending to Scotland within the legislative competence of the Scottish Parliament were included in a UK Bill, where Scottish Ministers have agreed in principle to advance an LCM. The UK Government is not seeking legislative consent for this provision. It considers that clause 19, as making provision for statements to be made in Parliament, relates to the reserved matter of the Parliament of the United Kingdom. The Scottish Government agrees that consent is not required for this provision because it specifies a procedure which is to be followed in respect of a particular class of provision in Bills before the UK Parliament. Whilst environmental protection and



environmental law are generally not reserved, this clause would not, in itself, have any effect on those matters. The Scottish Government also expects early notice and discussion of whether any such proposals would have the effect of reducing standards so as to give rise to the need for a statement to this effect. The Scottish Government would not consent to legislation where a UK Bill reduces environmental standards in a devolved area. The Scottish Government expects the Sewel Convention to be respected in these circumstances.

#### **58. What environmental principles would apply in Scotland in reserved areas?**

It is Scottish Ministers' policy intention to bring forward legislation which will include provision for environmental principles to which both Scottish Ministers and Ministers of the Crown will require to have regard in developing policies (including proposals for legislation) extending to Scotland.

#### **59. The Scottish Government has previously stated that it believes its environmental principles should guide the Secretary of State when exercising powers within devolved competence. How does the Scottish Government anticipate this would work?**

The position is set out in the answer to question 58.

#### **Part 1, chapter 2 – Office for Environmental Protection**

#### **60. What would be the impact of the OEP on the division of responsibility under the existing devolution settlement?**

There would be no impact. The scope of the OEP excludes matters that are within the legislative competence of the Scottish Parliament.

Chapter 2 of Part 1 of the Environment Bill as introduced sets up the OEP and specifies its powers and functions, including enforcement functions in relation to failures by public authorities to comply with environmental law. However, the OEP's functions are restricted to matters that are both environmental law, as defined in Chapter 3 of Part 1 (legislative provision mainly concerned with "environmental protection", which is also defined), and which is not "devolved legislative provision". Devolved legislative provision is defined as legislative provision (a) contained in an Act of the Scottish Parliament, or an instrument made under such an Act or (b) which would be within the legislative competence of the Parliament if contained in an Act of the Scottish Parliament. It is important to note that this exclusion includes matters that are currently provided for under UK legislation, but which could be legislated for by the Scottish Parliament.

#### **61. Is there any risk of governance gaps arising where UK Ministers act in devolved areas? For example, would the remit of the OEP include the Secretary of State acting in Scotland within devolved competence or does the Scottish Government expect that, where UK Ministers act in devolved areas, a Scottish governance body may be able to scrutinise those actions?**

It is not clear what is meant by UK Ministers acting in Scotland within devolved competence. If the Committee has examples of such actions, then we will be willing to consider how these examples would be treated under the future governance arrangements. The scope of the OEP excludes matters that are within the legislative competence of the Scottish Parliament.

**62. How might the remit of the OEP be engaged (and how could it interact with the potential remit of a new governance function in Scotland) in the following areas:**

**a. Functions undertaken by Scottish Ministers or public bodies in offshore waters where the Scottish Government has ‘executive competence’. In particular, which environmental governance body would have oversight of planning functions in offshore marine areas in Scotland?**

Management of the marine environment in the offshore marine area beyond the 12 nautical mile limit is outside Scotland as defined in the Scotland Act 1998. Marine planning and conservation for the offshore area can only be adopted with the agreement of the UK Secretary of State. The OEP will have no remit over the Scottish Ministers, but would have a remit over decisions taken by the UK Secretary of State in this regard. In practice, we will expect the future governance bodies to work together should issues arise with respect to marine planning and conservation.

**b. Areas such as chemicals regulation, where the Committee heard while considering notifications relating to deficiency-correcting EU exit SIs engages a complex mixture of reserved and devolved areas in relation to environmental law, human health, product standards etc.**

We expect the future governance bodies to work together if issues arise which cross over reserved and devolved responsibilities. The provisions in the Bill give the OEP an obligation to consult as described in the answer to question 63 and we plan to include a similar provision for our new governance body. . We expect the bodies to develop effective working arrangements.

**63. How does the Scottish Government anticipate the OEP would interact with a new Scottish environmental governance body?**

Clause 24(4) of the UK Bill provides that if the OEP considers that a particular exercise of its functions may be relevant to the exercise of a devolved environmental governance function by a devolved environmental governance body, the OEP must consult that body, and Scottish Ministers policy intention is that similar provision be made for our new governance body. Both the OEP and our new governance body will be independent of the respective Ministers in the performance of their functions. We expect the bodies to develop effective working arrangements to share expertise and experience on matters of common interest, and to consider issues that have cross border impacts, or that otherwise straddle reserved and devolved responsibilities. We expect that each administration will give their governance body informal guidance on these issues, given the complexity of devolution issues.

**64. Clause 24(4) provides that, if the OEP considers that a particular exercise of its functions ”may be relevant to the exercise of” a devolved environmental governance function by a devolved environmental governance body, the OEP must consult that body. Does the Scottish Government consider that the Bill contains sufficient safeguards to prevent any overlap of OEP’s functions with the functions of a devolved environmental governance body?**

Yes, as the scope of the OEP excludes matters that are within the legislative competence of the Scottish Parliament.

**65. What specific areas of environmental law, and which corresponding functions of public bodies in Scotland, are considered to be reserved by the UK Government and is the Scottish Government in agreement on each area? Has the UK Government provided the Scottish Government with a list or examples of such functions?**

The UK Government has acknowledged that the OEP's role in Scotland will be limited. It has cited potential examples of the OEP exercising its functions in relation to Scotland in respect of the Secretary of State's role in agreeing the designation of Marine Conservation Zones and matters relating to the oil and gas reservation and the nuclear energy reservations in the Scotland Act 1998. The relevance and application of these reservations to any particular environmental situation will depend on the precise issue that is at stake.

**Clauses 51, 52 and 53 – deposit schemes and charges for single use plastic items and carrier bags**

**66. These provisions do not apply to Scotland, where separate provision is being made; how might different schemes and charges across the UK impact on producers and retailers, as well as the UK internal market more generally?**

In relation to DRS, this issue has been extensively debated as part of the passage of the regulations and I have nothing to add to the extensive information already provided to the Committee.

The single use carrier bags charge is already different in each nation of the UK and was introduced at different times.

**Clause 59 – trans-frontier shipments of waste**

**67. To what extent would the amendments made by clause 59 in practice affect areas of devolved responsibility?**

Clause 59 does not affect areas of devolved responsibility. Trans-frontier shipments of waste legislation is reserved and applies on a UK-wide basis. The UK and Scottish Governments and enforcement authorities, including SEPA for Scotland, regularly discuss approaches to regulating trans-frontier shipments.

**International treaties**

**68. Unlike the Agriculture Bill (clause 40) and the Fisheries Bill (clause 36), the Environment Bill includes no powers for the Secretary of State to make secondary legislation in order to implement an international obligation. What is the Scottish Government's view about this?**

This is primarily a matter for the UK Government. Many pieces of UK and Scottish legislation already implement international obligations with respect to the environment, such as on climate change, international waste transfers and trade in endangered species.

**69. How does the Scottish Government anticipate any UK legislation to implement an international obligation would impact on Scottish Ministers' ability to pursue its environmental objectives?**

As the Committee will know, the Scottish Government has strong objections to aspects of the UK Government's approach to future trade negotiations, including the future relationship with the EU. In particular, we do not agree with the UK Government's rejection of future alignment on environmental standards and strong level playing field measures with the EU. These policies of the UK Government could make it more difficult or more expensive to

pursue high environmental standards in Scotland in the future. However, we are committed to maintain or enhance environmental standards in Scotland, and to seek to keep pace with EU Directives and Regulations as far as possible.

**70. More generally, does the Scottish Government anticipate that primary UK legislation will be required to implement other trade agreements?**

The UK Government has needed to put in place legislation to implement trade related issues, such as the European Union (Withdrawal) Act 2018, the Taxation (Cross-border Trade) Act 2018 and the European Union (Withdrawal Agreement) Act 2020 to extract the UK from one trade agreement, and had brought forward a Trade Bill in the 2017-19 Parliament. It seems highly likely that further primary UK legislation would be required to implement future trade agreements. There is no general provision in place under which future trade agreements can be implemented. The Committee may wish to seek an explanation from the UK Government.

**71. Does the Scottish Government anticipate that it would implement any such trade agreements insofar as within devolved competence, or does it expect that any such trade agreements would be implemented on a UK-wide basis?**

We expect that any legislative measures needed as a consequence of trade arrangements would be implemented in line with the split of reserved and devolved competence. It would remain open for measures within devolved competence to be implemented across the UK, if this was most effective, with the agreement of the devolved administrations.

**72. Given much of environment policy falls within devolved competence, what role does the Scottish Government expect to have in any future negotiations relating to environmental standards?**

The Scottish Government set out its proposals in “Scotland's role in the development of future UK trade arrangements,” published in August 2018. We await a response from the UK Government. In the meantime, we continue to engage with the UK Government, and expect to be fully involved in the setting of negotiating positions in devolved policy areas, including the environment. Although trade policy is reserved, environmental policy is devolved and the Scottish Government has a legitimate role in agreeing negotiating positions for devolved policy areas. However, this role has not been respected by the UK Government throughout the Brexit process, and that has continued into the setting of objectives for the negotiation of future trade agreements, including with the European Union.