



Brexit and Environmental Law

**Brexit, Henry VIII Clauses and
Environmental Law**

The UK Environmental Law Association is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law. UKELA is composed of 1,400 academics, barristers, solicitors, consultants, and judges involved in the practice, study and formulation of environmental law across England, Scotland, Wales and Northern Ireland.

UKELA remained neutral on the Brexit Referendum. In order to ensure regulatory stability and continued environmental protection UKELA considers it imperative that the UK's current environmental legislation is preserved pending proper review, and full and open consultation on options for change. UKELA's full position on Brexit can be found at www.ukela.org/ukelaposition.

UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK. The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. With the assistance of UKELA's specialist working parties the Task Force aims to inform the debate on the effect of withdrawal from the EU, and draw attention to potential problems which may arise.

The UKELA Brexit Briefing Papers have been produced under the guidance and approval of UKELA's Brexit Task Force chaired by Andrew Bryce and Professor Richard Macrory, and with input from relevant UKELA Working Parties and individuals. They do not necessarily and are not intended to represent the views and opinions of all UKELA members.

This report is the first in a series to be published by UKELA on the implications of Brexit for environmental law.

Other titles include:

- 1. Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications**
- 2. Brexit and Environmental Law: Enforcement and Political Accountability Issues**
- 3. Brexit and Environmental Law: The UK and International Environmental Law after Brexit**
- 4. Brexit and Environmental Law: Environmental Standard Setting Outside the EU**
- 5. Brexit and Environmental Law: the UK and European Environmental Bodies**
- 6. Brexit and Environmental Law: Wales, Brexit and Environmental Law**

**First published in Great Britain in 2017 by:
UK Environmental Law Association (UKELA)
One Glass Wharf, Bristol, BS2 0ZX**

www.ukela.org

© UK Environmental Law Association

ISBN: 978-1-9997986-3-5

All rights reserved. Without limiting the rights under copyright reserved above, no part of this publication may be reproduced, stored or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording or otherwise), without the prior written permission of both the copyright owner and the publisher of this book.

Table of Contents

| | |
|---|-----------|
| Background and Purpose of the Report | 3 |
| Our Analysis..... | 5 |
| Summary of numbers of clauses requiring Henry VII powers | 7 |
| Individual Acts of Parliament | 9 |
| Ancient Monuments and Archaeological Areas Act 1979 | 9 |
| Climate Change Act 2008 | 9 |
| Control of Pollution (Amendment) Act 1989..... | 10 |
| Control of Pollution Act 1974 | 10 |
| Countryside and Rights of Way Act 2000 | 10 |
| Electricity Act 1989..... | 11 |
| Endangered Species (Import and Export) Act 1976..... | 11 |
| Energy Act 2004 | 11 |
| Energy Act 2008 | 12 |
| Energy Act 2010 | 12 |
| Energy Act 2011 | 12 |
| Energy Act 2013 | 12 |
| Energy Act 2016 | 13 |
| Environment Act 1995 | 13 |
| Environmental Protection Act 1990..... | 16 |
| Food and Environment Protection Act 1985 | 18 |
| Marine and Coastal Access Act 2009 | 18 |
| National Parks and Access to the Countryside Act 1949 | 19 |
| Natural Environment and Rural Communities Act 2006..... | 19 |
| Planning (Listed Buildings and Conservation Areas) Act 1990 | 20 |
| Planning Act 2008..... | 20 |
| Planning and Compensation Act 1991 | 21 |
| Planning and Energy Act 2008..... | 21 |
| Pollution Prevention and Control Act 1999..... | 21 |
| Town and Country Planning Act 1990..... | 22 |
| Water Industry Act 1991 | 22 |
| Water Industry Act 1999 (as amended)..... | 23 |
| Water Resources Act 1991 | 23 |
| Wildlife and Countryside Act 1981 | 24 |
| Appendix: Withdrawal Bill extract, Clause 7..... | 25 |
| Endnotes | 27 |

Background and Purpose of the Report

- 1 Clause 7 of the European Union (Withdrawal) Bill (“the Withdrawal Bill”) gives the Secretary of State power to make regulations to deal with ‘deficiencies’ in EU law that is rolled over after Brexit as retained EU law¹. ‘Deficiencies’ are given a non-exclusive definition but will include, for example, provisions that have no practical application in the UK after Brexit or which confer power on Community institutions.
- 2 Some of these defective provisions will be contained in primary legislation and clause 7(4) therefore provides that the regulations may make any provision that could be made by an Act of Parliament – e.g. they may amend existing primary legislation. The power to make regulations that can amend primary legislation (so called ‘Henry VIII powers’) is controversial, though given the challenging time-scales involved it is hardly surprising that Government feels such powers are needed.
- 3 A memorandum concerning the delegated powers contained in the Withdrawal Bill was written for the Delegated Powers and Regulatory Reform Committee by the Department for Exiting the EU². This document says that it is essential that the clause 7 power is broad enough to capture all necessary corrections and says that “work across government has identified the main failures and deficiencies that would need correcting, subject to the negotiations” (para 14). It may well be that the provisions will be tightened during the passage of the Bill to confine the use of the powers to more clearly technical deficiencies.
- 4 The purpose of this report is to analyse the provisions of existing environmental primary legislation to determine the extent to which these powers are needed. Clause 7(2) of the Bill (as currently drafted) provides seven categories of ‘deficiencies’ but explicitly states these are not exclusive. However, it is clear from clause 7(1) that the power to use Henry VIII powers is related solely to deficiencies “arising from the withdrawal of the United Kingdom from the EU”. To take an example, this implies that a Minister who wished to weaken the strict protection given by the EU Birds Directive and transposed in the Wildlife and Countryside Act 1981 could not use these powers to amend the 1981 legislation. These would not be deficiencies arising from UK withdrawal according to clause 7 and any such changes would have to be made by new primary legislation introduced in the normal way.
- 5 It may be that the criteria in clause 7 will be further tightened during legislative process. In any event, in this report we have deliberately adopted a restrictive interpretation, drawing on the examples of deficiencies contained in clause 7(2), and what we feel is the intended spirit behind the clause 7. We feel that as a matter of general principle the use of Henry VIII powers should be kept to the minimum necessary for the effective continuance of domestic legislation after Brexit, but that the debate on this use of these powers should be informed by an accurate view as to the extent to which these powers will actually be necessary.
- 6 Clauses 8 (complying with international obligations) and 9 (regulations implementing the withdrawal agreement required on or before exit day) are also Henry VIII powers capable of amending primary legislation. Questions relating to compliance with international obligations are addressed in a forthcoming separate UKELA report, and this report focuses on the use of Henry VIII powers to handle deficiencies under clause 7.

Our Analysis

- 7 We have analysed the provisions of the core environmental primary laws in England. Although the application of these provisions in Scotland, Wales and Northern Ireland may not be so different as to affect the substance of our analysis (particularly in the application of these laws to Wales) there are two main reasons for limiting the scope of our analysis. First, as the environment is a devolved matter the provisions which are in force in each nation may differ and we wish to further consult UKELA members who practice environmental law in each of the devolved administrations. Second, the powers in the Withdrawal Bill which relate to devolution and the competences of the devolved administrations add another dimension to this exercise, and our further analysis will require detailed consideration in consultation with constitutional law experts.
- 8 A summary table of the number of the Henry VIII powers needed is provided below, followed by a detailed analysis of the relevant provisions in each Act of Parliament. **In summary, seventeen Acts of Parliament do not require any changes to be made. In the remaining twelve Acts, six changes are necessary and a further thirty would be advisable.**
- 9 There are three categories of headings we have used.
- 10 First, 'no change needed', where we see no good reason why references to European law and policy need to be removed. One key area where no change will be necessary are ambulatory 'definitional reference', where there is primary legislation defines a term by reference to an EU provision³. We have found that most of these definitions can continue after Brexit without need for further adjustment, in order to preserve regulatory continuity, until time can be taken for full re-evaluation.
- 11 Second, 'necessary changes', where provisions in an Act of Parliament will clearly be deficient and will need changing.
- 12 Third, 'advisable changes', where amendment to the statutory probably is not strictly necessary but would be useful for clarity. A number of Acts of Parliament contain provisions which make reference to 'EU obligations' or 'EU obligations under EU Treaties'. Strictly there will be no such obligations after exit, and it is arguable that the references can be retained without giving rise to any legal hostages to fortune. We have therefore listed this category as advisory only. Government might consider it would be useful to retain such powers in relation to the domestic implementation of any exit agreement between the UK and the EU. Such an agreement would have the status of an international legal agreement rather than an EU obligation as such – the statutory provisions would need to amended to make reference to such agreement if the powers thought useful.
- 13 We have not expressly addressed the related issue of scrutiny procedures proposed in the Bill. Under the Bill as drafted most regulations using Henry VIII powers will be agreed using negative resolution procedures (paragraph 3, Schedule 7). The Bill provides for certain specified categories (e.g. establishing a new public authority, creating a criminal offence, etc.) to be subject to affirmative resolution procedure in both Houses of Parliament (paragraphs 1 and 2, Schedule 7). The amendments that we have identified in this report as necessary or advisable would all be subject to negative resolution under the Bill as currently drafted.
- 14 We do not expect the Government necessarily to agree with all of our analysis of where Henry VIII powers will be needed or are advisable, but hope that it will assist the discussions that will follow. We have put together the likely use of Henry VIII powers in one field of law in one reasonably concise and accessible report. When the time comes for the Government to publish draft regulations using Henry VIII powers we hope that it will be able to produce something similar – this will considerably assist the process of Parliamentary scrutiny and public understanding.

Summary of numbers of clauses requiring Henry VII powers

| NAME | YEAR | CHANGES |
|--|------|---------------------------------|
| Ancient Monuments and Archaeological Areas Act | 1979 | No |
| Climate Change Act | 2008 | Advisable (1) |
| Control of Pollution (Amendment) Act | 1989 | Advisable (1) |
| Control of Pollution Act | 1974 | No |
| Countryside and Rights of Way Act | 2000 | No |
| Electricity Act | 1989 | No |
| Endangered Species (Import and Export) Act | 1976 | Advisable (1) |
| Energy Act | 2004 | No |
| Energy Act | 2008 | No |
| Energy Act | 2010 | No |
| Energy Act | 2011 | No |
| Energy Act | 2013 | Advisable (3) |
| Energy Act | 2016 | Advisable (1) |
| Environment Act | 1995 | Necessary (2) Advisable (10) |
| Environmental Protection Act | 1990 | Advisable (5) |
| Food and Environment Protection Act | 1985 | No |
| Marine and Coastal Access Act | 2009 | Advisable (4) |
| National Parks and Access to the Countryside Act | 1949 | No |
| Natural Environment and Rural Communities Act | 2006 | No |
| Planning (Listed Buildings and Conservation Areas) Act | 1990 | No |
| Planning Act | 2008 | Necessary (2) |
| Planning and Compensation Act | 1991 | No |
| Planning and Energy Act | 2008 | No |
| Pollution Prevention and Control Act | 1999 | Necessary (1) Advisable (1) |
| Town and Country Planning Act | 1990 | Advisable (1) |
| Water Industry Act | 1991 | No |
| Water Industry Act | 1999 | No |
| Water Resources Act | 1991 | Necessary (1) Advisable (2) |
| Wildlife and Countryside Act | 1981 | No |

Individual Acts of Parliament

Ancient Monuments and Archaeological Areas Act 1979

We have not found a need for any amendments in relation to England.

Climate Change Act 2008

We have identified one provision in the Climate Change Act where amendment would be advisable.

Carbon Budget

Section 8 requires the Secretary of State to set carbon budgets with a view, *inter alia*, of complying with “the European and international obligations” of the United Kingdom. The reference to European obligations of the UK post Brexit will make little sense. Strictly there will be no such obligations and retention of the provisions should have no legal effect, but removal may be advisable for the sake of clarity.

Although other provisions in the Climate Change Act refer to European law and policy, we see no good reason why these references should be removed.

Overall reduction duty

Section 2(2) gives the Secretary of State the power to amend the overall target reduction it is achieved (currently 80% by 2050) only where it appears to him there have been significant developments in scientific knowledge about climate change or “European or international law and policy”. The date for achievement may also be changed but only in the case of significant developments in European or international law and policy.

Despite the reference to European law and policy, there seems no good reason to amend this. It is a discretionary power and it would be sensible to retain the power should it be considered good policy to align the Climate Change Act with future European developments.

Carbon Budgets

Section 6 gives a similar power to amend in relation to percentage reductions specified in the Act for carbon budgets, and contains references to significant developments in European law and policy. Again there is no reason why these provisions need amending.

Section 10 provides a wide range of matters that must be taken into account in setting carbon budgets. These include ‘circumstances at European and international level’. There is no good reason why these provisions should not continue.

Base years for targeted gases other than CO₂

Section 25 specifies base years for a number of greenhouses gases other than CO₂. The Secretary of State may amend these base years but only if there have been significant developments in international or European law and policy. There is no good reason not to retain these references.

Interpretation

Section 70(4) contains a definition of ‘functions’ which refers to a Minister of the Crown exercising functions under section 2 European Communities Act 1972, section 57 Scotland Act 1998 (Community obligations), and section 82 Government of Wales Act 2006. Since section 2 is repealed from exit day and the devolved legislation is similarly amended there should be no need to amend section 70.

Section 90 allows to Secretary of State to amend the statutory definition of greenhouse gas if it appears to him that an agreement or arrangement at European or international level recognizes that the new gas contributes to climate change. This power should be retained as it may be useful to keep UK climate change legislation aligned to developments in Europe.

Trading Schemes

Schedule 2 contains provisions relating to trading schemes. Paragraphs 11 and 20 provide that regulations may provide for recognition of units relating to greenhouse gas trading schemes under any other trading scheme “at United Kingdom, European, or international level”. There is no reason why the power to recognise units contained in European trading schemes should not be retained. The schedule contains various other provisions concerning regulations establishing trading scheme which make reference to schemes established at European or international level. These provisions can be retained.

Control of Pollution (Amendment) Act 1989

This Act, amongst other things, provides for registration of carriers of controlled waste. This implements (in part) the Waste Framework Directive. In general the provisions of the 1989 Act will continue to operate on exit day, as they applied immediately before without the need for ‘corrective amendment’.

We have identified one provision in the Control of Pollution (Amendment) Act where amendment would be advisable.

Section 1(3) creates a power for the Secretary of State to exempt from the registration requirement ‘a person in relation to whom the prescribed requirements under the law of any other member State are satisfied.’

Once the UK itself is no longer a member State, the reference to ‘any *other* member State’ will be ambiguous and will need correcting. For example, assuming that the UK wishes to preserve provision for mutual recognition of registration schemes after exit day amendment, it could be amended so as to make clear the provision captures all Member States of the European Union.

Although other provisions in the Control of Pollution (Amendment) Act refer to European law and policy, we see no good reason why these references should be removed.

The Act includes key terms such as ‘controlled waste’ that are defined by reference to definitions in the Environmental Protection Act 1990 which in turn cross refer to the meaning under the Waste Framework Directive. We see no need for amendment to these definitional reference in order for these provisions to continue to make sense after Brexit⁴.

Control of Pollution Act 1974

We have not found a need for any amendments in relation to England.

Countryside and Rights of Way Act 2000

We have not found a need for any amendments in relation to England.

Electricity Act 1989

Provisions in the Electricity Act refer to European law and policy, however we see no good reason why these references should be removed.

Amounts of electricity specified in certificates

Section 32D(4) states that in making a banding provision in a renewable obligations order the relevant minister must have regard to the potential contribution of electricity generated from each renewable source to the attainment of any target which relates to the generation of electricity or the production of energy and is imposed by, or results from or arises out of, an EU obligation. Since there are unlikely to be any EU obligations in this context post Brexit there is no legal need to amend this provision.

Certificate purchase orders

Section 32V(4) makes an identical provisions section 32D(4) in relation to certificate purchase orders.

Endangered Species (Import and Export) Act 1976

We have identified one provision in the Endangered Species (Import and Export) Act where amendment would be advisable.

Schedule 4 defines animals whose sale is restricted. Paragraph 3 (mammals) and paragraph 5 (reptiles) both say that the species listed “are specified in this Schedule only in relation to populations excluded from Appendix I of Annex A to Council Regulation (EEC) No. 3626/82 on the implementation in the Community of the Convention on International Trade in Endangered Species of wild fauna and flora, as amended by Commission Regulation (EEC) No. 558/95.”

It may be considered that the scope of the species references in the Regulations is sufficient for UK compliance with CITES and no amendment strictly necessary. However it is noted that the species listed in these Annex change and that the ambulatory references will not update after exit day, therefore amendment under clause 8 may be appropriate.

Energy Act 2004

We have not found a need for any amendments in relation to England. There are provisions in the Energy Act which make reference to European law and policy, however we see no good reason why these references should be removed.

Interpretation

Section 132(1) (Interpretation of Chapter 5 of Part 2) defines the following phrases by reference to EU Directives:

“agricultural or forestry tractor” has the meaning given by Article 1 of Directive 2000/25/EC of the European Parliament and of the Council of 22 May 2000 on action to be taken against the emission of gaseous and particulate pollutants by engines intended to power agricultural or forestry tractors;

“inland waterway vessel” has the meaning given by Article 2 of Directive 97/68/EC of the European Parliament and of the Council of 16 December 1997 on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery; and

“recreational craft” has the meaning given by Article 1(3) of Directive 94/25/EC of the European Parliament and of the Council of 16 June 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft.

These are all definitional references which do not need amendment.

New standard conditions for transmission licences

Section 137(3) states that conditions published in accordance with subsection (2) shall be standard conditions for the purposes of transmission licences, subject to any modifications of the standard conditions for the purposes of licences of that type made under section 2(2) of the European Communities Act 1972.

Standard conditions for electricity interconnectors

Section 146(5) states that the standard conditions determined by the Secretary of State have effect subject to any modifications made under, *inter alia*, section 2(2) of the European Communities Act 1972. This not need changing because after the ECA is repealed there will be no such modification.

Standard conditions for gas interconnectors

Section 150(5) mirrors use of ECA in section 146

Energy Act 2008

We have not found a need for any amendments in relation to England

Energy Act 2010

We have not found a need for any amendments in relation to England

Energy Act 2011

We have not found a need for any amendments in relation to England

Energy Act 2013

We have identified three provisions in the Energy Act 2013 where amendment would be advisable.

General considerations relating to Part 2

Section 5 requires the Secretary of State, in exercising her function of making regulations under sections 6, 27, or an order under section 23 or 46, or a modification under section 26, 37 or 45 to have regard to, *inter alia*, the target set out in Article 3(1) and Annex 1 of the Renewables Directive 2009/28/EC.

It is arguable that it would be good future policy for the Secretary of State to still have regard to overall targets set in the EU Directive, in which case the provision can be retained; however she would not be bound by them and for the sake of clarity it may be advisable to remove this reference.

Compliance with nuclear safeguards obligations

Section 93 required the Office for Nuclear Regulation to do such things as it considers best calculated to secure compliance with safeguards obligations. The inclusion of Articles 77 to 85 of the Euratom Treaty within the obligations will be redundant, pending Brexatom negotiations, and it is advisable that this is amended.

General provisions for emissions limit duty: monitoring and enforcement

Schedule 5 paragraph 4(a) permits enforcement regulations to make provisions which corresponds (or is similar) to a provisions made under section 2(2) of the ECA 1972 in connection with the ETS Directive (subject to modification).

The provisions which these enforcement regulations relate to will after Brexit be defined as EU-derived domestic legislation under clause 2, and they will no longer be made under section 2(2) ECA 1972. It will be advisable that this reference is amended to reflect this change.

There are other provisions in the Energy Act 2013 which make reference to European law and policy, however we see no good reason why these references should be removed.

Decarbonisation targets

Section 2(h) says that among the matters which must be taken into account by the Secretary of State in setting or amending a decarbonisation target range include “circumstances at European and international level”. There is no need to amend this as it is merely a factor to take account of, and even after Brexit it would be a desirable factor for the Secretary of State to take account of.

Annual carbon dioxide emissions limit

Section 57(6) says that the Secretary of State may by regulations make provision about the interpretation of the emissions limit duty. Subsection (7) says that in particular, these regulation may make provision for specifying any category of emissions by reference to provision made by or under regulations implementing the ETS Directive. No need to change because references is to the implementing regulation.

Interpretation

Section 61 (interpretation of Chapter 8), “ETS Directive” means Directive 2003/87/EC of the European Parliament and of the Council.

Emissions Limit Duty: Monitoring and Enforcement

Schedule 5 paragraph 1(g) permits the provisions of enforcement regulations to include provisions about the provision, use and publication of information in relation to the compliance of operators with the emissions limit duty. Subparagraph (3)(a) clarifies that this may include information held for the purposes of their functions in relation to any such plant conferred under regulations implementing the ETS Directive. No need to change because references is to the implementing regulation.

Energy Act 2016

We have identified one provision in the Energy Act 2016 where amendment would be advisable.

Section 63(1) states that section 61 does not prohibit a disclosure of protected material by the Oil and Gas Authority which is made to a person mentioned in column 1 of the table, and other conditions are met. One such person is the competent authority under Article 8 of the Offshore Safety Directive 2013/30/EU. If the competent authority includes authorities within other EU member states, then after exit day it would be advisable to remove the reference.

Environment Act 1995

We have identified two provision in the Environment Act where amendment is necessary.

Miscellaneous Directions Provisions

Section 122 provides that where a direction is given to the Agency or SEPA etc. for the purpose of implementing any obligations of the United Kingdom under the EU Treaties this shall not be varied or revoked unless the EU obligations mentioned continue to be implemented and publicity requirements are satisfied.

It is necessary for these provisions to be amended, as the conditions required to vary or revoke directions implementing EU treaty obligations are likely to be difficult, if not impossible to satisfy after Brexit. This would frustrate the aim of the legislation.

Objectives for the Purposes of the National Waste Strategy

Schedule 2A paragraph 3 says that an objective of the National Waste Strategy is, *inter alia*, ensuring that the network referred to in paragraph 2 enables the European Union as a whole to become self-sufficient in waste disposal, and Member States individually to move towards that aim, taking into account geographical circumstances or the need for specialised installations for certain types of waste

It is necessary for these provisions to be amended. The Government might consider that self-sufficiency with the European Union will continue to be a useful objective but it is unlikely that UK networks should be bound to take this into account. The reference should therefore be deleted.

We have identified ten provisions in the Environment Act where amendment would be advisable.

General functions with respect to pollution control

In section 5 an appropriate agency's "pollution control powers" and "pollution control functions" mean respectively its powers or its functions under or by virtue of, *inter alia*, regulations made by virtue of section 2(2) of the European Communities Act 1972, to the extent that the regulations relate to pollution.

Similarly, section 108(15) states that in that section "pollution control functions", in relation to the Agency, the Natural Resources Body for Wales or SEPA, and in relation to a local enforcing authority, means the functions conferred or imposed on it by or under, *inter alia*, regulations made by virtue of section 2(2) of the ECA 1972, to the extent that the regulations relate to pollution.

Regulations made by virtue of section 2(2) ECA will be preserved as EU-derived domestic legislation under clause 2(2)(a). However, this reference is not one which will be interpreted in light of paragraphs 1 or 2 of Schedule 8, as these paragraphs do not apply to primary legislation. It is therefore advisable that these references are amended to reflect that the functions conferred or imposed are under regulations made other than by section 2(2) ECA 1972.

Ministerial directions to the new Agencies

Section 40 says that the appropriate Minister may give a new agency such directions as he considers appropriate for the implementation of, *inter alia*, any obligations of the United Kingdom under the EU treaties. However, as this provision is not covered by paragraphs 1 or 2 of Schedule 8 it is defective because it is redundant and it is advisable that it is amended.

Power to make schemes imposing charges

Section 41 provides powers for a number of purposes. So far as these relate to EU law and policy, these include:

Under subsection (c) as a means of recovering costs incurred by it in performing functions conferred by regulations made for the purpose of implementing Directive 2008/98/EC to the extent that it relates to hazardous waste (within the meaning given by Article 3(2) of that Directive) an appropriate agency may require the payment to it of such charges as may from time to time be prescribed.

Under subsection (d) as a means of recovering costs incurred by it in performing functions conferred by Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste, as amended from time to time, the Agency, the Natural Resources Body for Wales or SEPA may require the payment to it of such charges as may from time to time be prescribed.

Under subsection (e) as a means of recovering costs incurred by it in performing functions conferred by Regulation (EC) No. 850/2004 of the European Parliament and of the Council on persistent organic pollutants and amending Directive 79/117/EEC as amended from time to time, the Agency, the Natural Resources Body for Wales or SEPA may require the payment to it of such charges as may from time to time be prescribed;

Under subsection (f) as a means of recovering costs incurred by it in performing functions conferred by regulations made for the purposes of implementing Council Directive 2006/117/Euratom on the supervision and control of shipments of radioactive waste and spent fuel (as amended from time to time, an appropriate agency may require the payment to it of such charges as may from time to time be prescribed;

Under subsection (g) as a means of recovering costs incurred by it in performing functions conferred by regulations made for the purpose of implementing Directive 2006/66/EC of the European Parliament and of the Council on batteries and accumulators and waste batteries and accumulators, as amended from time to time, the Agency, the Natural Resources Body for Wales or SEPA may require the payment to it of such charges as may from time to time be prescribed.

Under paragraphs 1 and 2 of Schedule 8 the references in those schemes to Directives and Regulations “as from time to time amended” will stop updating on exit day, and will instead become references to the retained versions of those instruments. However, it is advisable that the enabling powers are similarly amended to refer to “as from time to time amended, so far as operative immediately before exit day”, in order to pick up amendments agreed before exit day, because paragraphs 1 and 2 of Schedule 8 will not apply to primary legislation. Note however that it may be arguable that these provisions, as means of recovering costs, may be subject to the restriction against the use of clause 7 powers, on the grounds that they impose or increase taxation, contrary to clause 7(6)(a)⁵.

In respect to environmental licences, section 41(2) allows charges to be prescribed in respect of, *inter alia*, any other approval, consent, consideration or determination carried out by the Agency relating to any obligations of the United Kingdom under the EU Treaties or any application for such an approval of consent, consideration or determination. It would be advisable to amend this only because no such obligations will exist after Brexit and therefore this clause will have no legal effect.

National air quality strategy

Section 80 provides that the Secretary of State shall as soon as possible prepare and publish a strategy containing policies with respect to the assessment or management of the quality of air. The strategy may also contain policies for implementing, *inter alia*, obligations of the United Kingdom under the EU Treaties.

It is advisable rather than necessary to remove references to obligations under the EU Treaty. No such obligations will exist post Brexit.

Reserve powers of the Secretary of State or SEPA

Section 85(5) provides that the Secretary of State shall also have power to give directions to local authorities other than local authorities in Greater London, requiring them to take such steps specified in the directions as he considers appropriate for the implementation of, *inter alia*, any obligations of the United Kingdom under the EU Treaties.

Section 86 provides similar for functions of county councils for areas for which there are district councils as section 85(5).

It would be advisable rather than necessary to amend these provisions because no such obligations will exist after Brexit and therefore this clause will have no legal effect.

Regulations for the purposes of Part IV

Section 87 provides for regulations to make provision, *inter alia*, for or in connection with implementing obligations of the United Kingdom under the EU Treaties so far as relating to the quality of air.

It would be advisable to amend this only because no such obligations will exist after Brexit and therefore this clause will have no legal effect.

Producer responsibility

Section 94(2) makes supplementary provisions which state that if it appears to the Secretary of State, *inter alia*, that any action proposed to be taken by the operator of a registered exemption scheme would be incompatible with any obligations of the United Kingdom under the EU Treaties, he may direct that operator not to take or, as the case may be, to take the action in question.

It would be advisable to amend this provision because no such obligations will exist after Brexit and therefore this clause will have no legal effect. However, not necessary since future obligations will not arise.

There are various other provisions in the Environment Act which make reference to European law and policy where we see no good reason why these references should be removed.

Charges in respect of the EU greenhouse gas emissions trading scheme

Section 41A allows charging authorities to require the payment of such charges as may from time to time be prescribed, *inter alia*, as a means of recovering costs incurred by it in performing functions conferred under or by virtue of regulations made for the purpose of implementing the EU ETS Directive in respect of the Registries Regulation 2013.

Definitions under subsection (7) define “the Registries Regulation 2013” as Commission Regulation (EU) No 389/2013. Similarly, “trading scheme registry” means any registry operated by the Agency for the purpose of meeting the obligations of the United Kingdom referred to in Articles 4(3) and 5(1) of the Registries Regulation 2013. Unless the UK makes a special agreement with the EU, the UK will no longer be a party to the EU emissions trading scheme. If that is the case, it may not be necessary to amend these provisions as there will no such obligations under the Directive.

Interpretation

Section 56 defines “environmental licence” in Part 1, in relation to an appropriate agency, as, *inter alia*, registration of a person as a broker of or dealer in controlled waste under any provision which gives effect in England and Wales to Article 26(b) of Directive 2008/98/EC of the European Parliament and of the Council on waste.

Similarly, “environmental licence”, in the application of Part 1 in relation to SEPA, means, *inter alia*, a permit granted by SEPA under regulations under section 2 of the Pollution Prevention and Control Act 1999, other than regulations made for the purpose of implementing the EU ETS Directive; and registration in respect of an activity falling within paragraph 17, 18, 36 or 39 of Schedule 3 to the Waste Management Licensing (Scotland) Regulations 2011, where the waste which is the subject of the activity consists of or includes waste batteries or accumulators to which Directive 2006/66/EC of the European Parliament and of the Council on batteries and accumulators applies, and those batteries or accumulators have been collected in accordance with Article 8 of that Directive.

Similarly, “the EU ETS Directive” is defined as Directive 2003/87/EC, as amended from time to time.

Producer responsibility

Section 93(3) says that except in the case of regulations for the implementation of, *inter alia*, any obligations of the United Kingdom under the EU Treaties, the Secretary of State’s power to make regulations under subsection (1) shall be exercisable only where the Secretary of State, after such consultation as is required by subsection (2), is satisfied as to the matters specified in subsection (6). As the reference to the EU treaties is only a reference to regulations which escape the requirements of that section this does not need changing.

Section 111(5) states that in that section “relevant regulations” means regulations made for the purpose of implementing the EU ETS Directive (as defined by section 56).

As these references relate to definitions they can all be retained.

Environmental Protection Act 1990

We have identified five provisions in the Environmental Protection Act where amendment would be advisable.

Obtaining information from persons and authorities

Section 19 allows the Secretary of State to serve a notice requiring a person to supply specified information, for the purpose, *inter alia*, of discharging “an obligation of the United Kingdom under the [EU] Treaties” or any international agreement: see section 19(2) notice power; and section 19(3) extension of that power for EU/international purposes. It would be advisable to amend the reference to obligations of the UK under the EU Treaties because no such obligations will exist after Brexit and this clause will have no legal effect.

Obtaining of information from persons

Section 116(1) allows the Secretary of State to serve notice requiring a person involved in importing etc. of certain

GMOs to provide specified information. Notices can only be served for certain purposes, including “the discharge by the Secretary of State of an obligation of the United Kingdom under the [EU] Treaties or any international agreement” concerning GMOs: section 116(2). The reference to obligations under the EU Treaties will no longer make sense after Brexit, and will require amendment.

It would be advisable to amend the reference to obligations of the UK under the EU Treaties because no such obligations will exist after Brexit and this clause will have no legal effect.

Power to give effect to Community and other international obligations

Section 156 creates regulation making power enabling the Secretary of State to make various provisions of the Environmental Protection Act 1990 (and of the Radioactive Substances Act 1993) have effect with specified modifications for the purpose of enabling the UK Government ‘to give effect to any EU obligation or exercise any related right’, subsection (1)(a).

It would be advisable to amend the reference to obligations of EU obligations and related rights because no such obligations will exist after Brexit and this clause will have no legal effect, notwithstanding the saving of rights under clause 4(1). If the reference were to be deleted (on the basis that the power is no longer necessary) it would be essential to ensure that any regulations made under this power prior to exit day are preserved by clause 2(2), or a new saving provision.

Power to prohibit or restrict the importation, use, supply or storage of injurious substances or articles

Section 140 creates powers to make regulations that (amongst other things) restrict the importation to the UK (and landing and unloading) of specified substances or articles, and requires that certain banned substances can be disposed of, treated or removed from the UK. Subsection (4) gives the Secretary of State power to apply these provisions in relation to substances subject to import etc. bans or restrictions, including those “by or under any EU instrument”.

After Brexit, this reference to import bans and restrictions imposed by EU instruments may no longer make sense and corrective amendment is advisable. There may be a case for clarifying the legislation to which it will apply after Brexit. Existing bans and restrictions may be retained as directive EU legislation under clause 3, and may still necessitate domestic regulation to implement them. However, after exit day EU instruments will be unable to ‘impose’ bans or restrictions on the UK and that the provisions therefore does not need amending as having no legal effect. Therefore, while it may be useful to maintain the power in relation to those EU laws (such as regulations) which continue to have effect after exit day, it would also be advisable to amend this provision to include a reference to applicable retained EU law.

The Environmental Protection Act includes a number of references to EU legislation, and domestic measures introduced to implement it. We see no good reason why these references should be removed or amended.

Conditions of authorisation

Section 7 concerns the conditions that regulators may include in authorisations for certain prescribed processes granted under section 6. Sections 7(1)-(2), read together, say that conditions shall be appropriate for achieving specified objectives, including compliance with ministerial Directions that have been issued to implement ‘any obligation of the UK under the EU Treaties... relating to environmental protection’. Section 7(12) then provides that regulators may also include conditions for securing compliance with quality standards or objectives in ‘relevant enactments’ including legislation made under section 2 ECA 1972.

Enactments made under section 2 ECA 1972 will be retained as EU-derived domestic law, these references will continue to make sense after exit day. No reference is made in the Withdrawal Bill to the post-Brexit status of ministerial Directions.

Waste offence (as applies in England and Wales)

Section 33(1)(b) creates an offence of submitting controlled waste (or causing or knowingly permitting this) to any unauthorised ‘listed operation’. Listed operation is defined under subsection (13) as an operation listed in Annex I or II of the revised Waste Framework Directive 2008/98/EC.

These provisions will continue to be operable after Brexit as they are definitional references to those operations

listed in Annexes I and II immediately before exit day. Note however that any amendment to this provision in future to update the reference to include any operations, listed in the Waste Framework Directive after exit day, may not be able to be applied using clause 7 owing to the restriction under clause 7(6)(c) against creating a criminal offence which is 'relevant' in that it carries a sentence of imprisonment for a term of more than 2 years. If new categories of waste operators were to be added then this may be *ultra vires*, given that the maximum possible sentence would be for 5 years imprisonment under this section.

Power of Secretary of State to require waste to be accepted, treated, disposed of or delivered

Section 57(8) provides that this power applies in relation to 'waste' within the meaning of the Waste Framework Directive. Under the Withdrawal Bill this reference will continue to be operable after Brexit without the need for corrective amendment. It will be interpreted as referring to waste within the meaning of the Waste Framework Directive that applied immediately before exit day.

Lists of waste displaying hazardous properties

Section 62A requires the Secretary of State and National Assembly for Wales to make regulations listing hazardous wastes that meet certain criteria. These criteria refer to 'the list of wastes established by Commission Decision 2000/532/EC, as amended from time to time' and 'the properties listed in Annex III to Directive 2008/98/EC' (the Waste Framework Directive). These duties will continue to be operable after Brexit without the need for 'corrective amendment'. Under the Withdrawal Bill they will capture the list of wastes in the version of Decision 2000/532/EC in force immediately before exit day (and not any future amendments after that date), and the properties listed in the version of Annex III to the Waste Framework Directive in force immediately before exit day.

Meaning of "waste" and household, commercial and industrial waste and hazardous waste:

These definitions in section 75 include references to definitions under Directive 2008/98/EC (the 'Waste Framework Directive') and Council Directive 91/689/EEC. The cross-references will continue to make sense after Brexit. Under the Withdrawal Bill they will bear the same meaning as they had immediately before exit day. As such, they will not require 'corrective' amendment.

There is a separate issue as to whether to amend the references so as to prevent future 'divergence' in meaning between UK waste law and EU waste law, for example in order to implement the terms of a trade agreement.

Food and Environment Protection Act 1985

There are provisions in the Food and Environment Protection Act which make reference to European law and policy. We see no good reason why these references should be removed.

The application of section 16(6)(a) to Northern Ireland, as modified by section 25(2A), to state that regulations if contained in a statutory rule which includes any regulations made under section 2(2) of the European Communities Act 1972, shall be subject to negative resolution within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954. These be retained as having no legal effect after ECA repealed.

Marine and Coastal Access Act 2009

We have identified four provisions in the Marine and Coastal Access Act where amendment would be advisable⁶.

Continuation of certain existing prosecutions

Section 30 allows the Marine Management Organisation to continue with prosecutions that were commenced before the MMO was created (or the Act was commenced). It includes reference to "enforceable EU obligation[s]" and "enforceable EU restriction[s]", which in turn are each defined as meaning obligations or restrictions "to which section 2(1) of the European Communities Act 1972 applies". These references will cease to make sense after Brexit, and can be removed (albeit the provisions probably are moribund in any event as the provision applies to what are by now very old prosecutions).

Directions by the Secretary of State

Section 37(2) gives the Secretary of State power to give directions to the MMO “for the implementation of any obligations of the UK under – (a) the EU Treaties, or (b) any international agreement to which the UK or the EU is for the time being a party.” The references to obligations under the EU Treaties will cease to be exercisable after Brexit, and may require corrective amendment. The reference to international agreements to which the EU is a party should also be removed.

Meaning of ‘retained functions’ etc.

Intricate provisions at section 60 concerning devolution include cross-references to the European Communities Act 1972 and other legislation (EU obligations) that will require careful analysis.

Creation of network of conservation sites

Section 123 requires the appropriate authority (Secretary of State, Welsh Ministers or Scottish Ministers) to designate Marine Conservation Zones in order to form a network of conservation sites. It requires the appropriate authority to have regard to “any obligations under EU or international law that relate to the conservation or improvement of the marine environment.” The reference to “any obligations under EU ... law” will make little sense after Brexit. Corrective amendment are advisable to the scope of this duty.

There are various other provisions in the Marine and Coastal Access Act which make reference to European law and policy. We see no good reason why these references should be removed.

Exemptions for certain dredging activities

Section 75 (5) adopts relevant definitions under the Waste Framework Directive. We see no reason to amend this. Those definitions will continue to apply after Brexit. Under the Withdrawal Bill they will be interpreted as bearing their meaning immediately before exit day.

Definitions/Interpretation

Sections 147 and 309 and schedule 13 Part 2, adopt the definitions variously of ‘sea’ and ‘estuarial waters’ under the Water Framework Directive. We see no good reason to amend these references. They will continue to make sense after Brexit, and be interpreted as referring to the meaning of those terms as applied immediately before exit day.

National Parks and Access to the Countryside Act 1949

We have not found a need for any amendments in relation to England

Natural Environment and Rural Communities Act 2006

We have not found a need for any amendments in relation to England. There are provisions in the Natural Environment and Rural Communities Act which make reference to European law and policy. We see no good reason why these references should be removed.

Sections 43(3), subsections (c) and (d) states that it is a defence for a person charged with an offence under this section to prove that his possession of the pesticide was for the purposes of doing anything in accordance with EU regulations 528/2012 and 1107/2009.

The Government might consider that this defence should continue as long as Regulation continues to have effect under provisions of Repeal Bill, therefore this provisions can be retained.

Planning (Listed Buildings and Conservation Areas) Act 1990

We have not found a need for any amendments in relation to England

Planning Act 2008

We have identified one provision in the Planning Act where amendment is necessary.

Infrastructure projects fees

Section 4(4) defines the Secretary of State's major-infrastructure functions as including the Secretary of State's functions in relation to proposed applications for orders granting development consent, under statutory provisions implementing the EIA Directive, and provisions of an EU instrument which from time to time replace provisions of the EIA Directive.

It is necessary for this provision to be changed as it refers to potential future changes of the EIA Directive after exit day, over which the UK will have no direct influence. The last part of the sentence "and provisions of an EU instrument..." should be deleted.

Rights of entry

Section 53 provides that a person may be authorised in writing by the by the Secretary of State to enter land for the purpose, *inter alia*, of facilitating compliance with implementing the EIA Directive, the Habitats Directive, or any EU instrument from time to time replacing all or any part of either of those Directives, so long as the entry is in connection with an application, proposed application or order granting development consent.

It is necessary for this provision to be changed because the reference to future replacements of the EIA and Habitats Directive will have to be removed. Regulations implementing the EIA and Habitats Directive will continue to have legal effect as EU-derived domestic legislation under clause 2 of the Withdrawal Bill. This provision may be amended to refer solely to 'legislation implementing...'; rather than the Directives themselves.

There are various other provisions in the Planning Act which make reference to European law and policy. We see no good reason why these references should be removed.

Electric Lines

Section 16 defines "European site" as having the same meaning as in the Conservation of Habitats and Species Regulations 2010. These reference can be retained as definitional reference.

Proposed exercise of powers in relation to legislation

Section 121 provides that a panel or council must send a draft of a proposed development consent order to the Secretary of State, and that the she may direct the panel or council to make specified changes to the order if it would contravene EU law. Under Sch 6, para 3, the Secretary of State can change or revoke a development consent order without the needs for an application to do so where the development, if it were carried out, would be in contravention of EU Law.

This provisions will be redundant but can be retained. As the panel or council must send a draft of the order to the Secretary of State for purposes other than the monitoring of compliance with EU law this requirement can be retained, as it does not provide any further burden on the panel or council.

Planning and Compensation Act 1991

We have not found a need for any amendments in relation to England

Planning and Energy Act 2008

We have not found a need for any amendments in relation to England

Pollution Prevention and Control Act 1999

We have identified one provision in the Pollution Prevention and Control Act where amendment is necessary.

General purpose for regulation of polluting activities

Section 1 says that the purpose of the regulation powers in section 2 is to enable provision to be made for or in connection with implementing the IPPC Directive, as well as otherwise regulating activities which are capable of causing any environmental pollution.

For clarity sake it would be preferable to amend this to refer to "...implementing the IPPC Directive as long as it remains part of UK retained law as defined in....." Power to make these regulation should continue until the IPPC Directive no longer has legal force within the UK, but not afterwards. Without amendment this provision is ambiguous as to this point and reliance may have to be placed on the *eiusdem generis* rule (that specific words are to be construed as confined to things of the same kind)⁷.

We have identified one provision in the Pollution Prevention and Control Act where amendment would be advisable.

Particular purposes for which provision may be made

Section 2 allows the Secretary of State to make provision by regulations for any of the purposes listed in, *inter alia*, Part I of Schedule 1. Part 1 includes schedule 1, paragraph 3, which states that one of the purpose of the Act is enabling the Secretary of State to give directions which regulators are to comply with, or guidance which regulators are to have regard to, in exercising functions under the regulations, including, *inter alia*, directions given for the purposes of the implementation of any obligations of the United Kingdom under the EU Treaties.

It would be advisable to amend these provisions because no such obligations will exist after Brexit and therefore this clause will have no legal effect. However, not necessary since future obligations will not arise.

Particular purposes for which provision may be made under section 2

Schedule 1 paragraph 20 allows for provisions to be made which, subject to any modifications that the Secretary of State considers appropriate, corresponds or is similar to, *inter alia*, any provision made, or capable of being made, under section 2(2) of the European Communities Act 1972 in connection with the IPPC Directive; Council Directive 75/442/EEC on waste, as amended; and any other directive of the Council of the European Union designated by the Secretary of State for the purposes of this paragraph by order made by statutory instrument.

Advisable to remove the reference, though presumably with repeal of ECA this provision in any event will have no legal effect after exit day.

There is also one further provisions in the Pollution Prevention and Control Act which make reference to European law and policy. We see no good reason why this reference should be removed.

Definitions

Section 1, subsection 3 says that in the definition of "environmental pollution"; "harm" is defined under five headings, the expressions used in the five headings have the same meaning as in the IPPC Directive.

As this reference relates to definitions it can be retained.

Town and Country Planning Act 1990

We have identified one provision in the Town and Country Planning Act where amendment would be advisable.

Assessment of environmental effects

Section 71A provides that the Secretary of State may by regulations make provision about the consideration to be given to the likely environmental effects of the proposed development, before planning permission is granted. These regulations may make the same, similar or corresponding provisions as provisions made “for the purposes of any EU obligation of the United Kingdom about the assessment of the likely effects of development on the environment, under section 2(2) of the European Communities Act 1972”

It would be advisable to amend these provisions because no such obligations will exist after Brexit and therefore this clause will have no legal effect. However, not necessary since future obligations will not arise.

There are various other provisions in the Town and Country Planning Act which make reference to European law and policy. We see no good reason why these references should be removed.

Meaning of “excluded development”

Section 61K excludes development from the provisions of section 61J (allowing for a neighbourhood development order to be made) if it is development that falls within Annex 1 of the EIA Directive. This is a definitional reference which can continue to have effect until Government decides to change the scope of the exclusion.

Interpretation

Section 336 interpretation provisions define “waste” within the meaning of Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council on waste, and not excluded from the scope of that definition by Article 2(1), (2) or (3).

Community Right to Build Orders

Schedule 4C, paragraph 6(1)(a) states that a local planning authority must decline to consider a proposal for a community right to build order if they consider that the specified development falls within Annex 2 to the EIA directive and is likely to have significant effects on the environment by virtue of factors such as its nature, size or location. Subparagraph (2) states that in determining whether or not the specified development is within subparagraph (1)(a), the authority must take into account any relevant criteria mentioned in Annex 3 to the EIA directive.

As these references relates to simple references they can be retained.

Water Industry Act 1991

We have not found a need for any amendments in relation to England. There are various other provisions in the Water Industry Act 1991 which make reference to European law and policy. We see no good reason why these references should be removed.

Functions of the Water Services Regulation Authority (WSRA) with respect to competition

Section 31(3) confers certain functions on the WSRA that are defined by reference to ‘agreements, decisions or concerted practices of the kind mentioned in Article 101(1) of the Treaty on the Functioning of the European Union’ and to ‘conduct which amounts to abuse of the kind mentioned in Article 102’. This is a definitional reference which can be retained to maintain continuity.

Disclosure of Information: Part II list of enactments in respect of which disclosure may be made

The list in Schedule 15 includes references to subordinate legislation made ‘for the purpose of securing compliance with’ Directive 2005/29/EC (concerning unfair business-to-consumer commercial practices in the internal market) or

with Directive 2006/114/EC (concerning misleading and comparative advertising). After Brexit, this list will continue to apply as it did immediately before exit day.

Water Industry Act 1999 (as amended)

We have not found a need for any amendments in relation to England

Water Resources Act 1991

We have identified one provision in the Water Resources Act 1991 where amendment is necessary.

Water Protection Zones

Section 93 (as amended) creates powers to make orders designating Water Protection Zones and regulating certain activities within those zones. Under subsection (1B) "The power under subsection (1A)(b) is exercisable only for the purpose of enabling the United Kingdom to comply with its obligations under the Water Framework Directive in relation to any applicable environmental objectives."

It would be advisable to amend these provisions because no such obligations under the Water Framework Directive will exist after Brexit. A corrective amendment may be necessary so that Water Protection Zone Orders will continue to be available to tackle water pollution in programmes of measures to achieve environmental objectives under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017.

We have identified two provisions in the Water Resources Act 1991 where amendment would be advisable.

Powers to give effect to international obligations

Powers available under section 102 (water pollution) section 116 (fisheries) allow the Secretary of State to make regulations modifying certain provisions of the Water Resources Act (and, in relation to fisheries, any other enactments) for the purpose of enabling the United Kingdom government to give effect to, *inter alia*, any EU obligations.

It would be advisable to amend these provisions because no such obligations will exist after Brexit and therefore this power will no longer be needed for this purpose.

Restriction on disclosure of information

Section 204(1) prohibits certain business information obtained under the Act to be disclosed without the business/individual's consent. Subsection 2(k) makes an exception for information obtained "in pursuance of an EU obligation".

After Brexit this will make little sense and should be deleted, on the basis that this exception will no longer be needed.

There are various other provisions in the Water Resources Act 1991 which make reference to European law and policy. We see no good reason why these references should be removed.

There are multiple references in the Act to European Directives. We see no good reason why these references should be removed or amended.

Works and operations in relation to controlled waters

Section 161ZA and 161ZB give regulators powers to carry out works and operations in relation to the hydromorphological quality of water bodies. They include expressions that are defined in the Water Framework Directive. These references will not continue to apply after Brexit, and bear the same meaning as they had immediately before exit day.

Enactments in respect of which disclosure may be made

This list at Part II of Schedule 24 makes reference to subordinate legislation made for the purposes of securing compliance with two Directives. Those cross-references will continue to make sense, and bear the same meaning after Brexit as they had immediately before exit day.

Wildlife and Countryside Act 1981

There are various other provisions in the Wildlife and Countryside Act which make reference to European law and policy. We see no good reason why these references should be removed.

Definitions

Sections 1(6A), 6(5A) and 16(9A) give “Re-population” and “re-introduction” the same meaning as in the Birds Directive. This is a definitional reference which can be retained to maintain continuity.

Possession of pesticides

A person shall not be guilty of an offence under section 15A(1) if the person shows that the possession of the pesticide was for the purposes of doing anything in accordance with Regulation (EU) No 528/2012.

There is no need to amend this at this time as these Regulations will continue to have effect after Brexit day as retained EU law.

Interpretation

Section 27 defines Wild Birds in relation Part 1 by reference to European Territory, i.e. geographical rather than legal. Note different wording in relation to Scotland, England and Wales. This is a definitional reference which can be retained to maintain continuity

Areas of special scientific interest

Section 28(9A) defines “estuarial waters” as any waters within the limits of transitional waters, within the meaning of the Water Framework Directive. This is a definitional reference which can be retained to maintain continuity

Duties of agriculture Ministers with respect to areas of special scientific interest

Section 32(3) defines ‘farm capital grant’ as, *inter alia*, a grant under regulations made under section 2(2) ECA 1972 to a person carrying on an agricultural business within the meaning of those regulations in respect of expenditure incurred or to be incurred for the purposes of or in connection with that business, being expenditure of a capital nature or incurred in connection with expenditure of a capital nature. Similarly, ‘grant provisions’ is defined as meaning the regulations under which the grant is made and the EU instrument in pursuance of which the regulations were made.

Application of Part 1 to Crown

Section 66A applies Part 1 to the Crown, as required by European law obligations under the Wild Birds Directive (79/409/EEC) and the Habitats Directive (92/42/EEC). [England and Wales only, indirect reference]

Appendix: Withdrawal Bill extract, Clause 7

“7 Dealing with deficiencies arising from withdrawal

- (1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—
 - (a) any failure of retained EU law to operate effectively, or
 - (b) any other deficiency in retained EU law,arising from the withdrawal of the United Kingdom from the EU.
- (2) Deficiencies in retained EU law include (but are not limited to) where the Minister considers that retained EU law—
 - (a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant,
 - (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it,
 - (c) makes provision for, or in connection with, reciprocal arrangements between—
 - (i) the United Kingdom or any part of it or a public authority in the United Kingdom, and
 - (ii) the EU, an EU entity, a member State or a public authority in a member State, which no longer exist or are no longer appropriate,
 - (d) makes provision for, or in connection with, other arrangements which—
 - (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
 - (ii) are otherwise dependent upon the United Kingdom’s membership of the EU, and which no longer exist or are no longer appropriate,
 - (e) makes provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which no longer exist, or are no longer appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties,
 - (f) does not contain any functions or restrictions which—
 - (i) were in an EU directive and in force immediately before exit day (including any power to make EU tertiary legislation), and
 - (ii) it is appropriate to retain, or
 - (g) contains EU references which are no longer appropriate.
- (3) But retained EU law is not deficient merely because it does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day.
- (4) *Regulations under this section may make any provision that could be made by an Act of Parliament.*
- (5) Regulations under this section may (among other things)—
 - (a) *provide for functions of EU entities or public authorities in member States (including making an instrument of a legislative character or providing funding) to be—*
 - (i) *exercisable instead by a public authority (whether or not newly established or established for the purpose) in the United Kingdom, or*
 - (ii) *replaced, abolished or otherwise modified, or*
 - (b) provide for the establishment of public authorities in the United Kingdom to carry out functions provided for by regulations under this section.
- (6) But regulations under this section may not—
 - (a) impose or increase taxation,
 - (b) make retrospective provision,
 - (c) create a relevant criminal offence,
 - (d) be made to implement the withdrawal agreement,
 - (e) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it, or
 - (f) amend or repeal the Northern Ireland Act 1998 (unless the regulations are made by virtue of paragraph 13(b) of Schedule 7 to this Act or are amending or repealing paragraph 38 of Schedule 3 to the Northern Ireland Act 1998 or any provision of that Act which modifies another enactment).
- (7) No regulations may be made under this section after the end of the period of two years beginning with exit day.

(8) The reference in subsection (1) to a failure or other deficiency arising from the withdrawal of the United Kingdom from the EU includes a reference to any failure or other deficiency arising from that withdrawal taken together with the operation of any provision, or the interaction between any provisions, made by or under this Act.”

Endnotes

- 1 An extract from the Withdrawal Bill is included in the Appendix to this report
- 2 [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20\(Withdrawal\)%20Bill.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf)
- 3 We note that paragraphs 1 and 2 of Schedule 8 provide that existing ambulatory references in enactments to direct EU legislation, etc. are retained (although they will stop updating on exit day), however this does not apply to primary legislation.
- 4 There is a separate issue as to whether to legislate to prevent future 'divergence' in meaning between UK law and EU law, for example in order to implement the terms of a trade agreement.
- 5 There is a history of the courts taking a strict view that taxation powers should not be delegated and taking a wide view of 'taxation' in order to support this. i.e. Commissioners for Tax v Cure and Deeley [1962] 1 Q.B. 340; [1961] 3 W.L.R. 798 where a power to create rules 'for any matter for which provision appears to them necessary for the purpose of giving effect to the Act' did not include the right to levy a penalty on late tax returns.
- 6 Note however that we have focused on the environmental/conservation provisions, and have not looked in detail at the fisheries enforcement provisions, e.g. under Chapter 6 of the Act.
- 7 This would not be ideal. As Lord Scarman said in Quazi v Quazi [1980] AC 744 at 824A, "If the legislative purpose of a statute is such that a statutory series should be read *eiusdem generis*, so be it; the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfil the purpose of the statute. The rule, like so many other rules of statutory interpretation, is a useful servant but a bad master."



UKELA is grateful to the Economic and Social Research Council
for their assistance in publishing these reports.

Brexit and Environmental Law: Brexit, Henry VIII Clauses and Environmental Law

This report aims to clarify how the powers given to ministers in the Withdrawal Bill will be used to amend 'deficiencies' in environmental laws after Brexit.

Clause 7 of the European Union (Withdrawal) Bill proposes to give ministers far-reaching powers to amend 'deficiencies' in the law after Brexit – essentially provisions that would make no technical or practical sense when the UK is no longer a member of the EU. This power would allow Ministers to use regulations to amend existing Acts of Parliament – so-called 'Henry VIII' powers.

As a matter of general principle the use of Henry VIII powers should be kept to the minimum necessary for the effective continuance of domestic legislation after Brexit. However, we also believe that any debate on these powers must be informed by an accurate view as to the extent to which they will actually be used.

The purpose of this report is to set out where UKELA foresee these powers being used to amend the UK's environmental laws after Brexit. UKELA applied its technical expertise to analyse all the Acts of Parliament relevant to the environment in England, identifying any provisions which a Minister might consider 'deficient' after Brexit and therefore require amendment.

Our analysis shows that this power should be used far less than many would expect – at least in the environmental field.

September 2017

The UK Environmental Law Association (UKELA) is the foremost body of environmental lawyers in the UK. UKELA aims to promote better law for the environment and to improve understanding and awareness of environmental law.

UKELA remained neutral on the Brexit Referendum. UKELA's Brexit Task Force was established in September 2016 to advise on all matters relating to and arising from the UK's decision to leave the European Union insofar as this impacts environmental law, practice and enforcement in the UK.

The Task Force has been examining the legal and technical implications of separating our domestic environmental laws from the European Union and the means by which a smooth transition can be achieved. The Task Force aims to inform the debate on the effect that withdrawal from the EU will have, and to draw attention to potential opportunities and problems which may arise.

This report is printed on sustainably sourced paper.

Registered charity number: 299498 (Registered in England and Wales)
Company listed by guarantee: 2133283 (Registered in England and Wales)



ISBN 978-1-9997986-3-5



9 781999 798635 >