



Brexit and Environmental Law

Environmental Standard Setting after Brexit

February 2018

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 one of a series to be published by UKELA on the implications of Brexit for environmental law.

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- **Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications**
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**First published in Great Britain in 2018 by:
UK Environmental Law Association (UKELA)
One Glass Wharf, Bristol, BS2 0ZX**

www.ukela.org

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ISBN: 978-1-9997986-5-9

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Executive Summary

Standards are a crucial aspect of environmental regulation. They set the level of ambition for the quality of our natural environment and are a key means of delivering improvements.

Much of the debate around Brexit and the environment has focused on whether withdrawal from the EU might result in environmental standards in the UK being downgraded. Concerns have been expressed that, once the UK is no longer required to implement ambitious, often challenging EU standards, these will be relaxed in order to reduce costs to business. In this context, UKELA takes the position that the level of environmental protection must not be diminished after Brexit. In many areas current standards must be maintained as a matter of international law, because the EU-derived standards serve also to implement international environmental agreements.

This report, however, focuses on a different question: the procedural and governance arrangements for developing environmental standards after Brexit.

There is considerable activity at EU level to develop the standards that apply under EU-derived environmental legislation. This activity involves EU institutions such as the European Commission, and various committees or networks of representatives from governments, regulators, industry and environmental groups. Withdrawal from the EU raises the prospect of the UK ceasing to be involved in this activity, and having to decide whether and how to develop domestic processes for setting environmental standards.

This paper considers the particular challenges that arise in three different scenarios:

- 1) if the UK is required to keep pace with EU standards under the terms of withdrawal or a trade agreement;
- 2) if the UK wishes to keep pace with evolving EU standards as a matter of domestic policy; and
- 3) if standards are to be developed domestically.

An approach of 'keeping pace' with EU standards is a very different approach to that of the European Union (Withdrawal) Bill which is designed to preserve EU-derived law as it applies immediately before Exit Day without capturing changes to EU law made after Exit Day. Governments and regulators would need to ensure that domestic standards across the UK are capable of keeping pace; and new legislative mechanisms may be needed for this purpose.

An approach of 'keeping pace' also raises the prospect of the UK committing to future standards developed under EU-level procedures that it has no influence over. Consideration will need to be given to ways of maintaining some form of continued UK influence in those procedures after Brexit.

If standards are to be developed domestically after Brexit, the UK and devolved governments will need to make provision for reviewing and revising the standards that apply on Exit Day and for setting new domestic standards in the future. This is to avoid having standards that are frozen in time, and that are not capable of being adapted to address future developments in technical processes and in scientific understanding of environmental risks.

Consideration will need to be given as to how to repatriate the considerable work currently undertaken at EU level. For each set of environmental standards, UK and devolved governments will need to decide which bodies should perform which roles, how different stakeholder groups should be engaged, whether new institutions need to be created, the extent of government or Parliamentary oversight, and procedures for adopting the standards. Governments in the UK will need to develop clear policies on all these points. Those responsible for developing standards will need to be properly resourced to be able to perform the role effectively. Unless these points are addressed, there is a real risk of regulatory confusion, uncertainty and standards that lack legitimacy.

The UK and devolved governments will also need to decide whether and how to provide for common frameworks for setting environmental standards across the UK. This issue raises complex and politically sensitive questions related to devolution.

Given the range of important and difficult policy issues at stake, we consider it crucial that proposals for new arrangements for domestic standard-setting are developed in consultation with key stakeholders. New arrangements should be tailored to different areas of environmental regulation and appropriate for the different UK administrations. Draft Regulations and guidance documents should be produced and consulted on, prior to adoption.

Our report considers two contrasting approaches to setting environmental standards under current EU frameworks: namely standards for industrial processes under the Industrial Emissions Directive and water classification standards under the Water Framework Directive. We consider whether these might suggest

starting points, or provide lessons, for developing environmental standards domestically after Brexit. We suggest that domestic procedures for developing industrial process standards after Brexit should aim to replicate the best features of the EU 'Seville process', by involving regulators, industry and environmental NGOs. For water classification standards, we suggest that the current UK Technical Advisory Group provides a helpful structure for environmental regulators across the UK to collaborate and develop common standards. However, we do not consider the UK Technical Advisory Group to be well-placed to take on the considerable work currently undertaken at EU-level to review and update water classification standards. Should the UK and devolved governments wish to repatriate this work domestically, we suggest that future procedures or institutions should involve a range of stakeholders, including regulators, industry and environmental NGOs. This is so as to help ensure standards are developed based on a sound understanding of the environmental, social and economic impacts.

Brexit and Environmental law: Environmental Standard Setting after Brexit

Introduction

- 1 Standards are a crucial aspect of environmental regulation. The main types of standards are:
 - **Technical prescriptions** – rules requiring the adoption of specific technologies, such as a requirement that power plant fumes are cleaned by wet scrubbing.
 - **Emissions standards** – rules specifying pollutant amounts that different kinds of installations may emit, often expressed as concentration values or reduction values (the degree to which pollutants must be removed from effluent).
 - **Quality standards** – standards relating to the quality of ambient air, rivers, lakes, coastal waters or groundwater. These are often expressed as limit values for the concentration of a particular substance in the relevant medium.
 - **Product standards** – rules relating to the design, manufacture or performance of products. Examples include standards for the construction and use of motor vehicles, or energy consumption for electrical goods (light bulbs and recently vacuum cleaners).
 - **Sampling/compliance standards** - these are requirements concerning sampling (such as the number and location of sampling points) and the data to be used for enforcement.
- 2 There is considerable activity at EU level to develop the standards that apply under EU-derived environmental legislation. This activity involves EU institutions such as the European Commission, and various committees or networks of representatives from governments, regulators, industry and environmental groups.
- 3 The procedures for devising these various kinds of environmental standards are not uniform; and there are a number of different ways by which the standards are given recognition in EU law. Some such as ambient air quality standards and related sampling methods under the Ambient Air Quality Directive are established through pre-legislative committee process and directly expressed in the legislation itself. By contrast, the link between the Industrial Emissions Directive and the process standards applied to industrial activities is less direct, in that individual permit conditions are based (amongst other things) on the Best Available Techniques reference documents drawn up under the 'Seville Process' – a pan-EU, highly structured, technical and participatory process established under the Directive (see further, **Box 1**) – though there is some discretion to depart from these. Other kinds of standards are devised through governance approaches involving a different suite of public and private actors within and across member states. Thus, in relation to water quality standards, the Water Framework Directive provides for EU-level standards for concentrations of 'priority substances' to be set out in 'daughter Directives', and leaves it to member states to develop local standards for other aspects of water status. Member states do so applying the principles and criteria set out in the Directive itself and in guidance developed by networks involved in the Common Implementation Strategy (see further, **Box 2**).
- 4 The less direct method of incorporating standards clearly provides more flexibility and allows for adaptation without having to change the body of the law. But this report is concerned with the processes of making standards, and does not advocate any particular model for giving them legal recognition.

Box 1: Setting standards for Best Available Techniques for industrial processes

The so-called ‘**Seville Process**’ relates to the work carried out under the auspices of the European IPPC Bureau to exchange information about best available techniques for industrial processes under the Industrial Emissions Directive 2010/75/EC (and formerly the IPPC Directive). Best available techniques are technical prescriptions for different kinds of industrial processes designed to prevent or reduce emissions and environmental impacts. The standards developed under the Seville Process are set out in Best Available Techniques reference documents (‘BAT reference documents’).

Adoption of guidance in BAT reference documents is for the Commission (or Council in certain circumstances) under procedures set out in Council Decision 1999/468/EC. These broadly involve a Committee of representatives of Member States chaired by the Commission with varying degrees of involvement of the European Parliament.

The conclusions on Best Available Techniques contained in BAT reference documents are the reference for regulators when setting permit conditions for different kinds of industrial process.^a

For each BAT reference document, the IPPC Bureau sets up a **Technical Working Group (TWG)** of between 100 and 200 experts. These groups are made up of representatives from the European Commission, member state governments, trade associations, individual businesses, environmental organisations, research institutes, and national and EU environmental regulators. The **European IPPC Bureau (EIPPCB)** acts as network coordinator and facilitator. The aim of the system is to seek consensual unanimous decision making by Technical Working Groups based on scientific expertise, argument and persuasion. Amongst other things, the Bureau acts as network mediator in areas of significant disagreement. The **IED Article 13 Forum** (formerly known as the Information Exchange Forum under the IPPC Directive) comprised of representatives of member states, large associations and the Commission, has an overview of the process. The Forum also discusses significant disagreements and political conflicts.

^a See Article 14(3) of the Directive. Some BAT reference documents contain emission levels associated with the best available techniques set out in the BAT conclusions. Where they do, regulators must ensure that emissions limit values in permits do not exceed those emission levels. Note that regulators must also apply a number of general principles when setting permit conditions, including that best available techniques are applied.

- 5 Withdrawal from the EU raises a number of important issues concerning processes for setting environmental standards after Brexit. This paper considers issues that arise in three scenarios:
 - 1) if the UK is required to keep pace with EU standards under the terms of withdrawal or a trade agreement;
 - 2) if the UK wishes to keep pace with evolving EU standards as a matter of domestic policy; and
 - 3) if standards are to be developed domestically, how to repatriate the standard-setting functions currently carried out at EU level (including decisions about which domestic bodies should perform which roles, whether new institutions should be created, and what the procedures and governance arrangements should be).
- 6 This report considers these issues in general terms and makes a number of recommendations.
- 7 On each scenario, different standard-setting regimes raise particular challenges that governments and policy makers will need to consider and consult on when deciding on post-Brexit arrangements. It is beyond the scope of this report to examine all of those regimes. To explore the complexity of this post-Brexit regulatory issue, we focus on two contrasting examples of standard setting: the approach to developing standards for different kinds of industrial process (known as Best Available Techniques reference documents under the Industrial Emissions Directive); and arrangements for developing water quality standards under the Water Framework Directive. We consider how UK and devolved governments might approach setting these kinds of standards after Brexit. This raises questions about where the power to legislate should lie, and where co-ordination or collaboration between regulators and administrations would be desirable. We also consider how these case studies shed light on setting environmental standards in these and other areas of environmental regulation.

Box 2: Water Framework Directive procedure for developing quality standards

The Water Framework Directive sets a framework for member states to protect and enhance the status of water bodies. Water status is assessed by reference to an array of standards.

Taking the example of surface water bodies, the criteria for determining their ecological status are expressed in general terms in the Directive, leaving it to Member States to set locally-specific 'classification schemes', including detailed environmental quality standards. In order to ensure a consistent approach to standard setting and other aspects of implementation of the Directive, Member States, the Commission and Norway have agreed on a **Common Implementation Strategy (CIS)**. Common Implementation Strategy workstreams are coordinated by a strategic co-ordination group that includes 'representatives of all Member States, EFTA countries, acceding, candidate and potential candidate countries, stakeholder organisations representing Business and Industry (B&I), non-governmental organisations (NGO) and inter-governmental organisations (IGO)'. Workstreams include developing guidance documents on technical aspects of monitoring and status assessment, as well as a wide range of other matters.

The chemical status of a surface water body is assessed by reference to environmental quality standards for substances that pose a significant risk to the aquatic environment that have been identified as 'priority substances'. These standards are determined at EU-level and set under the 'Priority Substances Daughter Directive'.^b That Directive also provides for the Commission to maintain a 'watch list' of substances to be monitored for possible future identification as priority substances. The Water Framework Directive provides for the Commission to review the priority list of substances every four years and come forward with proposals for legislative amendments as appropriate. Art 16(5) provides that:

In preparing its proposal, the Commission shall take account of recommendations from the Scientific Committee on Toxicity, Ecotoxicity and the Environment, Member States, the European Parliament, the European Environment Agency, Community research programmes, international organisations to which the Community is a party, European business organisations including those representing small and medium-sized enterprises, European environmental organisations, and of other relevant information which comes to its attention.

Proposals are adopted by the European Parliament and Council.

^b See Directive 2008/105/EC of the European Parliament and of the Council as amended by Directive 2013/39/EU.

- 8 In focusing on the procedural and governance arrangements for developing standards after Brexit, this report does not advocate what those future standards should be. Whilst the issue is beyond the scope of this report, we would take this opportunity to restate UKELA's position that the level of environmental protection must not be diminished. As some environmental standards serve both to implement EU law and international agreements, downgrading of those standards may not be permissible as a matter of international law. Any changes to domestic environmental standards after Brexit must ensure that the UK continues to comply with its international obligations. A separate UKELA report¹ gives details of those international environmental agreements, and examines the challenges for ensuring their continued application and implementation after Brexit.

Issues if the UK is required to keep pace with evolving EU environmental standards under a trade agreement or under the terms of withdrawal

- 9 It is possible that a future trade deal with the EU might require UK environmental standards in certain areas to converge with those of the EU so as to remove barriers to trade. To implement the terms of such a deal, the UK would need to ensure that domestic environmental standards keep pace with EU standards as they evolve and develop after Brexit. This would also be the case in the event of a 'soft Brexit', whereby the UK agrees to continue to be bound by certain EU laws, for example as a condition of staying in the European Economic Area.
- 10 The approach of 'keeping pace' is a very different approach to that of the European Union (Withdrawal) Bill, as first introduced to Parliament². The Withdrawal Bill is designed to preserve EU-derived law as it applies immediately before Exit Day without capturing changes to EU law made after Exit Day.
- 11 Without domestic provision for automatically keeping pace with future changes to environmental standards, this would have to be done after Brexit as a matter of continuous conscious up-dating. The UK and devolved governments will need to ensure there are powers to do this. In the past, governments have relied extensively on the regulation-making power under section 2(2) of the European Communities Act 1972 to legislate on environmental matters, but this will be repealed by the Withdrawal Bill. Whilst there are wide-ranging parent Acts in many areas that include significant regulation-making powers, these will need to be carefully checked to ensure there are no gaps once the European Communities Act is repealed. There will be a need in certain areas for clarification as to which regulation-making powers are devolved and which are reserved. Clause 7 of the Withdrawal Bill would introduce a new power to make regulations that might help plug the gap for updating certain types of standards. The power is, however, limited in scope and any regulations would need to be made before the clause 7 power expires two years after Exit Day.³
- 12 If any kind of formal recognition or adoption procedure for new standards were required (for example procedures for adopting new regulations), there is a risk that governments within the UK might fall behind implementing new standards. This could be simply because of election and recess timetables, even where there is the full intent to keep up. Should governments fall behind for whatever reason, the result would be that standards in each of the countries in the UK could fall out of kilter with each other, or with those of our EU trading partners.
- 13 Should a trade deal or the terms of withdrawal effectively require domestic environmental standards to keep pace with EU standards, the UK faces the prospect of being bound by future standards set under EU-level procedures that it has no influence over. A separate UKELA report considers whether it would be possible for the UK to negotiate some form of continued participation after Brexit in the co-operation bodies, networks and forums involved in developing various EU-level standards.⁴

Issues if the UK chooses to keep pace with evolving EU environmental standards as a matter of policy

- 14 Even if the UK were not required to keep pace with future EU environmental standards under a trade agreement or under the terms of withdrawal, the UK and devolved governments might still wish to continue to do so in some regulatory areas. Developing robust standards with a sound environmental and technical underpinning is a resource-intensive exercise. By adopting EU standards, the UK and devolved governments would benefit from the work done at EU-level and avoid the significant costs associated with doing this work domestically.
- 15 In theory, an approach of keeping pace with evolving EU standards could provide regulatory certainty and simplicity for businesses that operate across the EU. It could also limit the scope for standards to diverge across the UK. This would help avoid some of the difficulties that might otherwise arise regulating cross-border activities and areas.
- 16 The approach of keeping pace with evolving EU standards as a matter of policy raises the same issues that arise if the approach were required under a trade deal: namely, the need to ensure domestic environmental legislation is capable of keeping pace with future changes to EU standards; and the potential loss of UK influence in procedures for developing standards that will bind UK industries and regulators (see paragraphs 11-13, above).

Setting standards domestically after Brexit

General issues

- 17 In the third scenario, the UK and devolved governments may decide to determine future standards domestically (rather than follow evolving EU standards), in some or all areas of environmental regulation. This course of action would be consistent with the principle of returning decision-making power to the UK.
- 18 As noted above, the European Union (Withdrawal) Bill is intended to ensure that the same laws apply after Brexit as applied immediately before. In relation to environmental standards, this approach brings the crucial benefit of regulatory stability on Exit Day. However, **the UK and devolved governments will also need to make provision for reviewing and revising the standards that apply on Exit Day and setting new domestic standards in the future. This is to avoid having standards that are frozen in time on Exit Day, and that are not capable of being adapted to address future developments in technical processes and in scientific understanding of environmental risks.**
- 19 Consideration will need to be given as to how to repatriate the considerable work currently undertaken at EU level to develop standards. The task of reviewing and developing new standards is a resource-intensive one. It will involve complex technical assessments of data and modelling, as well as judgments on how to balance environmental considerations with economic and social factors (where these are relevant considerations). It is quite possible that new EU environmental standards in some areas will form the starting point when deciding on new domestic standards. This would avoid the need to duplicate the considerable work already done at EU level. But there would still be a need to critically assess those EU standards to determine whether they are appropriate to adopt domestically.
- 20 **For each set of environmental standards, decisions will need to be taken about which bodies should perform which roles, how different stakeholder groups should be engaged, whether new institutions need to be created, the extent of government or Parliamentary oversight, and procedures for adopting the standards. Governments in the UK will need to develop clear policies on all these points. Those responsible for developing standards will need to be properly resourced to be able to perform the role effectively. Unless these points are addressed, there is a real risk of regulatory confusion, uncertainty and standards that lack legitimacy,** as is illustrated by the case study of screening levels for contaminated land in **Box 3**.
- 21 EU law has provided for common standards and frameworks for environmental regulation across the EU and within the UK. Withdrawal from the EU and adopting a 'domestic' approach to environmental standard-setting brings the possibility of greater divergence of approaches in England, Wales, Scotland and Northern Ireland. Given this possibility, **the UK and devolved governments will need to decide whether and how to provide for common frameworks for setting environmental standards after Brexit.**⁵ This raises complex and politically sensitive questions related to devolution: in particular, whether to provide frameworks for 'commonly agreed standards' (reached by consensus among all the governments) or for 'common UK standards' (which might be unilaterally imposed by the UK government in line with the original Withdrawal Bill). Common frameworks or other means of coordinating or collaborating on standard setting across the UK would help avoid unnecessary regulatory complexity or barriers to trade for businesses that operate across the UK due to there being different standards in each country. There may be good reasons for divergent approaches on certain issues to reflect local circumstances. EU environmental legislation often makes provision for local variations, and this kind of flexibility may be particularly appropriate after Brexit.
- 22 **Given the range of important and difficult policy issues at stake, we consider it crucial that proposals for new arrangements for domestic standard-setting are developed in consultation with key stakeholders. New arrangements should be tailored to different areas of environmental regulation and appropriate for the different UK administrations. Draft Regulations and guidance documents should be produced and consulted on, prior to adoption.** Legislation should be scrutinised at the appropriate level. If there are to be common standards in particular areas of environmental regulation, it will need to be decided which, if any, of the parliaments within the UK has oversight of the legislation.
- 23 We consider below two contrasting approaches to setting environmental standards under current EU frameworks, and whether these might suggest starting points, or provide lessons, for developing environmental standards domestically after Brexit. At the very least, these case studies highlight the legal, technical and practical complexity of bringing the tasks of environmental standard-setting back within domestic control.

Box 3: Developing screening levels for contaminated land: a case of regulatory confusion and uncertainty

Part 2A of the Environmental Protection Act 1990 (Part 2A) was brought into force on 1 April 2000 in England and Wales and 1 June 2000 in Scotland. It provided a legal definition of contaminated land based on the concept of 'SPOSH' – significant possibility of significant harm. Statutory guidance was published by the then Department of the Environment, Transport and the Regions for England and Wales in 2000, and by the Scottish Government in 2006. In Northern Ireland, the Contaminated Land Regime is set out in Part 3 of the Waste & Contaminated Land (Northern Ireland) Order 1997 but is not yet in force.

Before Part 2A, various numbers were used to specify 'acceptable' concentrations of contaminants in soil for different land uses, including values set out in the Inter-Departmental Committee on the Redevelopment of Contaminated Land (ICRCL) guidance notes and Dutch standards. These were not always applied in the manner they were intended.

In 2002, Defra withdrew the ICRCL guidelines and replaced them with Soil Guideline Values (SGVs) developed by the Environment Agency using their Contaminated Land Exposure Assessment model (CLEA). CLEA can also be used by assessors to derive their own Generic Assessment Criteria (GAC). The CLEA model uses generic assumptions about the fate and transport of chemicals in the environment and generic land use scenarios for site conditions and human behaviour to estimate child and adult exposure to soil contaminants for those living, working and playing on contaminated sites over long time periods. SGVs and GAC derived using CLEA are derived from Health Criteria Values, which describe a benchmark level of exposure to a chemical at which, unless stated otherwise, long-term human exposure to chemicals is tolerable or poses a *minimal* risk.

In 2012, Defra revised its Part 2A statutory guidance for England and Wales, introducing a four category system for classifying land, ranging from Category 4 (risk posed is acceptably low) to Category 1 (risk is clearly unacceptable). Defra's rationale for revising the guidance was 'to give greater clarity to regulators as to how to decide when land is and is not actually contaminated land'. The guidance envisioned that new tools would be developed to help assessors apply the new approach, including the development of generic screening levels to help assessors decide when land might be assumed to be in Category 4 (i.e. land where there is 'no risk or the risk of contamination is *low*').

Following publication of the guidance, Defra funded a research project to develop screening values (the Category 4 Screening Levels, or C4SLs) for four generic land uses: residential, allotments, commercial and public open space. Six values were produced from this project (for arsenic, benzene, benzo(a)pyrene, cadmium, hexavalent chromium and lead). The values are based on 'low levels of toxicological concern' and were described by the Project Manager CL:AIRE (Contaminated Land: Applications in Real Environments) as 'pragmatic yet still strongly precautionary'. The broad membership of the project team and the project's workshops/consultations were designed to ensure that the methodology has as broad a consensus as possible in the contaminated land community. The Department for Communities and Local Government (DCLG) confirmed that C4SLs were suitable for use in planning applications.

However, the Chartered Institute of Environmental Health and the consultancy LQM disagreed with the basis of the project and decided to publish their own set of values, the 'S4ULs', still based on minimal risk. Their objection was that the C4SLs did not adhere to the precautionary principle.

The C4SL group argued that their values were based on the most up to date toxicology data and that the S4ULs used out of date or insufficiently peer-reviewed studies.

Defra did not fund any further development of values beyond the initial six. They made the methodology available to industry and left them to get on with producing values.

SAGTA (an association of UK landowners which manages land contamination issues) issued a press release in January 2015 inviting industry representatives to join a steering group to fund and develop a further fifty C4SLs. However, there has been no progress to date.

To add to the complexity of the situation, the consultants Atkins developed their own model (AtRisk) which they licence commercially. Other consultants have developed their own sets of values that they use proprietarily and don't share.

The Scottish Government has not changed its Part 2A guidance, and therefore strictly speaking the C4SLs have no application in Scotland. But the SGVs have been withdrawn. The Scottish Government commissioned the Institute of Occupational Medicine to review the methods used for human health risk assessment in Scotland and to identify the gaps in applying those methods to implement the statutory regime. The report recommended that the Scottish Government considers sponsoring the development of 'Scottish Reference Doses' to support Scotland's regulators in making informed decisions on whether risks are unacceptable. To date, there have been no policy decisions by the Scottish Government and no further development of the concept.

The Northern Ireland Environment Agency has not produced guidance of its own and instead refers to the EA/Defra guidance.

None of these values have a statutory basis.

Case Study: Developing domestic standards for industrial processes

- 24 The EU 'Seville process' provides for standards for Best Available Techniques for different industrial processes to be developed based on an exchange of information between experts from regulated industries, environmental NGOs, member states, regulators and the Commission. The process is overseen by the European IPPC Bureau, which sets up Technical Working Groups for different industrial processes, organises the work of those groups, and drafts Best Available Techniques reference documents ('BAT reference documents') setting out their conclusions. These are then adopted by the Commission (or in certain circumstances the Council), following a committee procedure (see **Box 1**, above).
- 25 This participative approach to developing standards contrasts starkly with the more traditional approach of specifying standards in the text of the Directive itself. Under the traditional approach, standards will typically originate as proposals from the executive (the Commission in the case of EU standards, and a government department in the case of domestic standards), before being subject to consultation and/or negotiation and final adoption.
- 26 In theory, the more participative Seville process has a number of advantages over the traditional approach to setting standards. By involving relevant industries, environmental NGOs and regulators in the process of developing the standards themselves, it is arguably a more effective way of harnessing core relevant scientific and technical expertise than the traditional approach of merely consulting those groups. Standards developed with involvement of industry are expected to be more likely to work in practice and to reflect scientific and technical developments. For industry, involvement in the process possibly enhances their ability to judge which way the tide is flowing on different issues, giving them longer to adjust and enable the direction of travel to be incorporated in design and development processes well before the final proposals are fixed. By giving core stakeholder groups a greater role, the process also arguably enhances the credibility, reliability and public confidence in the process and the standards themselves (subject to concerns noted below about under-representation of environmental groups, and democratic accountability).⁶
- 27 The Seville Process has not been without criticism. Environmental groups have typically been underrepresented in Technical Working Groups, giving rise to criticisms of 'regulatory capture' of the process by well-resourced, self-interested industry groups. Where this occurs, the resulting standards may be less ambitious or environmentally protective than would otherwise have been the case, and they may also lack legitimacy. The 'Seville-style' approach of effectively delegating the work of developing BAT standards to stakeholder groups is also vulnerable to the criticism of weak democratic accountability.
- 28 If the UK and devolved governments wish to develop BAT reference documents domestically after Brexit, they will need to decide whether and how to repatriate the work done at EU level. A first question is whether a participative 'Seville-style' approach of involving core stakeholders in the development of standards is appropriate at all. An alternative, more traditional approach would be to enable government or regulators themselves to develop new standards in guidance, as regulators currently do for BAT standards and emission

limit values for 'Part B' activities (broadly, industrial activities that operate on too small a scale to be subject to the requirements of the Industrial Emissions Directive). This would be cheaper and simpler than creating new procedures or institutions to involve stakeholders in the work. Stakeholders could be given an opportunity to comment if draft guidance were consulted on prior to some kind of formal procedure for adoption.

29 Whilst such an approach may be appropriate for low-level industrial activities, we do not consider it suitable for developing future BAT reference documents for the kinds of industrial processes that fall within the Industrial Emissions Directive. Governments or regulators are unlikely to have the high levels of resources, technical expertise and understanding of potential costs that are needed to develop standards that are both environmentally sound and cost-effective and workable in practice. They might deal with a lack of 'in-house' resource by engaging consultants to develop guidance with standards, as used to be common practice when developing environmental standards. However, consultants, too, are unlikely to have the breadth of expertise and access to information. Although consulting on draft guidance would allow stakeholders the opportunity to provide this kind of information, as consultees they are unlikely to have the same level of influence on the standards or to devote the same amount of resource to the consultation exercise as they would if they were involved in the process of developing them.

30 **We consider it far preferable that future arrangements for setting new BAT reference documents domestically should aim to replicate the best features of the Seville process. Specifically, they should ensure that representatives from industry, environmental NGOs and regulators are involved in the process for developing proposals for new standards.** A well-designed, transparent system would bring the potential benefits noted in paragraph 26 including greater efficiency, workability and credibility. Further, a more participative approach to developing BAT reference documents should bring decision-making closer to those affected.

31 The task of developing a domestic 'Seville-style' procedure is, however, a challenging one in terms of the legal framework and institutional architecture required, given the range of interests involved, the level of technical expertise required and breadth of industries involved. It is not simply the case of 'translating' the EU rules concerning the Seville process into UK rules. The EU rules are a highly technical and resource-intensive process, involving a wide cast of actors and considerable regulatory knowledge. The actors and the scope of the exercise would necessarily be different in the UK.

32 There are various fundamental considerations for UK governments to address in setting up a similar participatory process for developing new BAT reference documents domestically (quite apart from the question of whether each country should set its own standards, both in content and in legal form). These include: which stakeholders should be actively involved in the process; whether standards should be adopted by Ministers to bolster the democratic legitimacy of the process, and potentially Parliament/Assemblies (although BAT conclusions might be regarded as unsuitable for meaningful scrutiny by Parliament/Assemblies, given they are by nature very detailed, technical documents); and what other kinds of scrutiny procedures would be appropriate for BAT standards in a domestic, devolved context.

33 Institutionally, the process for developing standards could operate in a number of ways (whether on a UK or a devolved basis: see further, paragraphs 35-36 below). One approach would be to create a new independent body to oversee or co-ordinate the work of stakeholders and regulators to develop standards. The body could report to UK/devolved governments, and recommend standards for approval by ministers or parliaments/assemblies. An independent body such as this could be invaluable to oversee work on developing standards and to provide authoritative information, possibly also covering a range of other environmental areas.

34 Another option might be for the stakeholders involved in developing standards to do so as members of a forum established and overseen by one or more environmental regulator (depending on whether the process operated on a UK or devolved basis). This would avoid the need to create a new body, albeit the regulator(s) would need to be properly resourced to carry out the role effectively.

35 It would need to be decided whether the procedure for developing the standards should operate on a UK-wide basis, or whether there should be separate procedures in each administration in the UK. A procedure for coordinating work across the UK would potentially avoid duplication of effort and save costs. A coordinated approach is likely to result in less divergent standards across the UK, bringing advantages for businesses that operate across the UK of regulatory simplicity and avoiding barriers to trade. The Industrial Emissions Directive does allow a fair amount of local discretion to determine actual standards in the light of local circumstances⁷, and this could be maintained for each devolved administration.

- 36 If a new independent body were created to oversee developing standards for the whole of the UK, the devolution aspect would have to be taken into account. Questions to be considered include: how would the needs and interests of different parts of the UK be reflected? Where would political accountability lie? Who should pay? (This includes costs of shared buildings, which was a major stumbling block in tribunal reform which had contemplated reserved and devolved tribunals sharing premises.) Such a body could serve either to soften or increase concerns over either a 'UK power grab' or excessive fragmentation.
- 37 A third alternative to the traditional or participative approaches would be for government to instruct specific sectors to work on standards applicable to their areas of operation. Those standards could then be presented to government for approval. This kind of approach has been seen recently in relation to waste regulation overseen by Defra, with the waste sector involved in developing Codes of Practice and protocols for practical application.
- 38 Such an approach may work for day to day management of businesses, but it seems inappropriate for establishing standards such as BAT decisions that form part of a legally enforceable framework. Such standards need to be developed with full regard not only to the impact on industry, but also to wider environmental and social impacts, where a multiplicity of interests require to be balanced.
- 39 **Whatever approach is taken, the UK and devolved governments will need to ensure the procedure for developing and applying new standards is clearly reflected in the applicable guidance and legislation.** Current domestic legislation requires regulators to keep pace with BAT standards developed under the Seville Process. Thus, regulators are required to review permits within four years of the publication of relevant BAT conclusions, and to update permit conditions if necessary.⁸ BAT conclusions are defined by reference to BAT reference documents drawn up under the Seville Process.⁹ It is arguable that these requirements will continue to apply so as to require regulators to keep pace with BAT reference documents drawn up under the Seville Process after Exit Day, notwithstanding the provisions of the Withdrawal Bill. Clarifying amendments and/or guidance on this point would be advisable to avoid uncertainty or confusion.
- 40 This case study of BAT standard setting not only demonstrates the challenges of the task ahead if the UK and devolved governments are required to develop their own BAT-equivalent standard setting processes, but may also provide lessons for other forms of environmental standard setting that are repatriated to the UK. Different areas of environmental decision-making have different sectoral and technical starting points, but most will require new domestic architectures of institutional expertise and participatory decision-making of some type.

Case Study: Developing domestic standards for classifying the status of water bodies

- 41 The Water Framework Directive sets a framework for member states to protect and enhance the status of water bodies. It requires member states to prepare river basin management plans which include environmental objectives for each water body and programmes of measures for achieving them. These must be reviewed and updated every six years.
- 42 Standards are a key element of the Directive. As outlined above (see **Box 2**), the status of water bodies (and whether they have met their environmental objectives) is assessed by reference to detailed domestic 'classification schemes' including numerical environmental quality standards. The standards for assessing surface water 'ecological status' (and some aspects of groundwater status) are determined by member states domestically, applying detailed criteria in the Directive and relevant guidance in Water Framework Directive Common Implementation Strategy documents. The standards for assessing surface water 'chemical status' are set at European level under the 'Priority Substances Daughter Directive'¹⁰. Those standards are determined and reviewed every four years under a procedure that involves the European Commission preparing proposals that take account of recommendations from a wide range of institutions and stakeholders¹¹ (see further, **Box 2**).
- 43 In the UK, the role of developing classification schemes is carried out by the UK Technical Advisory Group (UKTAG), a partnership of the principal UK environment and conservation agencies: the Environment Agency, Natural England, Natural Resources Wales, Scottish Environment Protection Agency, Scottish Natural Heritage and Northern Ireland Environment Agency. Through UKTAG, the different agencies work together to prepare and agree recommendations to the UK government and devolved administrations for common standards across the UK. They do so applying the criteria in the Directive and guidance in Common Implementation Strategy documents. Ministers ultimately take decisions on the standards that should apply in classification schemes. These have been established through Classification Directions or Regulations made by Ministers in each

jurisdiction.¹² The Classification Directions also include standards for 'priority substances' that reflect (and transpose) values set under the 'Priority Substance Daughter Directive' (see **Box 2**, above).

- 44 Most of the work developing domestic classification standards was undertaken in the years leading up to 2008 when the first classification schemes were introduced. However, these have been updated since then and will require updating after Brexit to reflect changes to scientific understanding about the aquatic environment and environmental risks. For example, the standards for 'priority substances' will need to be reviewed against new data on toxicity and other matters, and consideration will need to be given as to whether to identify new priority substances. This will involve reviewing data about a wide range of 'contaminants of emerging concern'.¹³ These include novel substances or materials, such as nanoparticles or new pharmaceuticals. They also include substances such as antiseptics, solvents and personal care products that may have been around for decades, but whose effects may not yet be well understood. Currently, this work is carried out at EU level, through the four-yearly review of the list of priority substances and through work maintaining and updating the 'watch list' of substances to be monitored so as to gather data that could support them being identified as priority substances in the future.¹⁴
- 45 **Consideration will need to be given as to the procedures for reviewing and updating water classification standards after Brexit, and the bodies that should be involved in this. What will be appropriate will depend crucially on the overall approach that the UK and devolved governments wish to take to implementing the Directive after Brexit.**
- 46 **One scenario would be for the UK and devolved governments to continue with the present approach of determining domestic standards in accordance with the Water Framework Directive:** namely by continuing to develop local classification schemes based on Directive criteria and Common Implementation Strategy guidance; and by continuing with standards for current and future priority substances determined at European level under Priority Substances Daughter Directives. This would avoid the need to develop new institutions and procedures for carrying out the work that is currently undertaken at EU level.
- 47 **Under this approach, the domestic function of setting local standards for surface water ecological status (and aspects of groundwater status) could continue to be carried out by UKTAG.** The UKTAG approach of developing proposals for (generally) common standards that are then applied in the different jurisdictions would avoid difficulties that could arise were different sets of classification standards to apply after Brexit in England, Wales, Scotland and Northern Ireland (see further, paragraph 54, below).
- 48 The UKTAG approach to developing proposals for common standards for the whole of the UK represents a potentially helpful model for the UK coordination of standard setting in other areas. This approach, based on collaboration and consensus between regulators, avoids the need to create new institutions and to address the potentially difficult devolution questions associated with that (see further paragraphs 33-36 above).
- 49 **An alternative scenario would be for the UK and devolved governments to take over domestically the standard-setting functions currently carried out at EU level.** This would involve taking on considerable, complex and contentious work streams. For example, the work currently carried out by the European Commission to review the list of priority substances and the 'watch list' of potential priority substances, involves consideration of large amounts of data – there are currently 45 substances on the priority list, each with up to five standards¹⁵, and ten substances on the 'watch list'¹⁶ – and taking into account recommendations from a wide range of institutions and stakeholder organisations. The costs implications of setting standards for certain substances can be extremely high. For example, the cost of introducing appropriate technology to strip out ethinyl estradiol – an endocrine disruptor commonly used in the contraceptive pill – completely from wastewater has been estimated at £30bn for England and Wales.¹⁷
- 50 **We do not consider UKTAG in its present form to be a suitable forum to take on these EU-level functions for developing new or revised standards.** This is partly due to the scale and complexity of the scientific assessments, which would require considerably more resource than environmental regulators presently are likely to have. In addition, environmental regulators are unlikely to have access to detailed information about cost and technical feasibility of meeting standards for priority substances. Should standards be developed that are unduly stringent, this would risk poor compliance (instead of the standards driving environmental improvements), unforeseen costs, or businesses being forced to cease operations unnecessarily.
- 51 To address these concerns, **we suggest that procedures for reviewing and updating water classification standards after Brexit should involve a range of stakeholders including representatives from industry and environmental NGOs, as well as environmental regulators.**

- 52 One way of doing this that builds on current institutions would be for UKTAG to be required or guided to consult and take account of information and recommendations from relevant industries, environmental NGOs and perhaps also research institutes when developing proposals for standards. This kind of approach would mirror the EU-level approach under Article 16(4) of the Water Framework Directive of requiring the European Commission to develop proposals for standards for priority substances that take account of recommendations from a wide range of organisations. For UKTAG to carry out this role, however, would require significantly more resources than environmental regulators currently have.
- 53 Alternatively, the role of developing proposals for new water classification standards could be given to a new independent body which also has responsibility for setting standards in other areas such as BAT standards. This possibility and associated challenges is discussed above at paragraphs 33-36. As noted in that discussion, consideration would need to be given as to whether to provide for a single UK-wide body (and, if so, where the political accountability should lie) or separate bodies for each devolved nation.
- 54 The question of whether the body/bodies should develop proposals for common standards to be applied in each devolved jurisdiction or for separate sets of standards would also need to be considered. Water standards raise particular challenges here, due to the existence of cross-border water bodies such as the River Wye. Common standards for cross-border water bodies are essential for regulators either side of the border to be able to regulate them meaningfully. If the UK and devolved governments were to decide against developing frameworks for common standards (see paragraph 21, above), some provision would therefore need to be made for developing and agreeing common standards for cross-border water bodies. This would include provision for authorities in Northern Ireland and the Republic of Ireland to cooperate over standards for cross-border water bodies there.

Endnotes

- 1 UKELA, 'Brexit and Environmental Law: the UK and International Law after Brexit' (September 2017).
- 2 European Union (Withdrawal) Bill [Bill 5 (2017-2019)], as introduced to the House of Commons on 13 July 2017.
- 3 The EU (Withdrawal) Bill provides for EU law to be carried forward or retained in domestic law and then 'corrected' (through Regulations) to deal with any deficiencies arising from withdrawal and to ensure the law continues to operate correctly after exit. The powers to 'correct' the retained EU law include powers (in clause 7(5) of the Bill) to '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...'. The Explanatory Note to the Withdrawal Bill states: 'Subsection (5) provides, non-exhaustively, for what the secondary legislation made under this power can do. For example, it can transfer the functions of EU authorities to UK public authorities or create new UK public authorities to take on those functions. *These functions might include the ability to set rules or create standards, which are currently made by the EU as non-legislative acts (delegated and implementing acts)*' (emphasis added).
- 4 UKELA, 'Brexit and Environmental Law: the UK and European Cooperation Bodies' (January 2018).
- 5 For a discussion of challenges faced in developing environmental law in Wales after Brexit, see UKELA, 'Brexit and Environmental Law: Wales, Brexit and Environmental Law', by Victoria Jenkins (October 2017). For a discussion of challenges creating common frameworks see *Brexit: Who's in charge here?*, Professor Colin Reid, University of Dundee, in the September/October 2017 edition of UKELA's eLaw journal.
- 6 See discussion of the potential advantages of delegating policy to regulatory networks in Koutalakis, Charalampos (2005) *Regulatory Effects of Participatory Environmental Networks; The case of the 'Seville Process'*. Paper prepared for the EUSA 9th Biennial International Conference, Austin, Texas. (Unpublished)
- 7 See provision for derogating from emissions standards based on BAT due to local environmental conditions: Article 15(4)(a) of the Industrial Emissions Directive.
- 8 For Scotland, see the Pollution Prevention and Control (Scotland) Regulations 2012, regulation 44(1)(d) which requires the Scottish Environment Protection Agency to review the conditions of a permit within four years of the publication of BAT conclusions. For England and Wales, see the Environmental Permitting (England & Wales) Regulations 2016, Schedule 7 paragraph 7. This requires the regulator to review an environmental permit in accordance with Article 21 of the Industrial Emissions Directive, which in turn requires reviews and updates within four years of publication of decisions on BAT conclusions.
- 9 See regulation 4 of the Pollution Prevention and Control (Scotland) Regulations 2012, and paragraph 6(2) of Schedule 7 to the Environmental Permitting (England & Wales) Regulations 2016.
- 10 See Directive 2008/105/EC of the European Parliament and of the Council as amended by Directive 2013/39/EU.
- 11 See Article 16(4) and 16(5) of the Water Framework Directive.
- 12 For England and Wales, see the Water Framework Directive (Standards and Classification) Directions (England and Wales) 2015. For Scotland, see The Scotland River Basin District (Standards) Directions 2014 and the Scotland River Basin District (Status) Directions 2014. For Northern Ireland, see The Water Framework Directive (Classification, Priority Substances and Shellfish Waters) Regulations (Northern Ireland) 2015. Additional instruments exist setting standards for classifying waters in cross-border river basin districts.
- 13 See *Routledge Handbook of Water Law and Policy*, eds A. Rieu-Clarke, A. Allan, S. Hendry (2017) Routledge Press: Chapter 7 'Contaminants of Emerging Concern'.
- 14 For details of the 'watch list' see Article 8b of Directive 2008/105/EC, as inserted by Article 2(5) of Directive 2013/39/EU.
- 15 See current version of Annex X to the Water Framework Directive, inserted by Article 1(2) and Annex I to Directive 2013/39/EU.
- 16 See Commission Implementing Decision (EU) 2015/495 of 20 March 2015.
- 17 Owen, R. and Jobling, S. (2012) Environmental science: The hidden costs of flexible fertility, *Nature* (485/7399), 441–441.



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

Brexit and Environmental Law: Environmental Standard Setting after Brexit

Standards are a crucial aspect of environmental regulation. They set the level of ambition for the quality of our natural environment and are a key means of delivering improvements.

Much of the debate around Brexit and the environment has focused on whether withdrawal from the EU might result in environmental standards in the UK being downgraded. This report, however, focuses on a different question: the procedural and governance arrangements for developing environmental standards after Brexit.

There is considerable activity at EU level to develop the standards that apply under EU-derived environmental legislation. Withdrawal from the EU raises the prospect of the UK ceasing to be involved in this activity, and having to decide whether and how to develop domestic processes for setting environmental standards.

This paper considers the particular challenges that arise in three different scenarios:

- 1) if the UK is required to keep pace with EU standards under the terms of withdrawal or a trade agreement;
- 2) if the UK wishes to keep pace with evolving EU standards as a matter of domestic policy; and
- 3) if standards are to be developed domestically.

The third scenario – setting standards domestically – raises the biggest practical and legal challenges, as governments will need to decide how to repatriate the considerable work currently undertaken at EU level. This will involve decisions about which bodies should perform which roles, how different stakeholder groups should be engaged, whether new institutions need to be created, and whether and how to provide for common frameworks for setting standards in England, Scotland, Wales and Northern Ireland.

This report takes two contrasting case-studies: standard-setting for industrial processes and water classification standards. It considers whether current arrangements might suggest starting points, or provide lessons, for developing standards domestically after Brexit. In both cases, the report recommends that governments consider ways of involving a range of stakeholders, including regulators, industry and environmental NGOs, in developing standards after Exit Day.

February 2018

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.

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



ISBN 978-1-9997986-5-9



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