

Edward Mountain MSP
Convenor
Net Zero, Energy and Transport Committee

31 July 2023

Dear Edward,

UK Retained EU Law (Revocation and Reform) Act 2023- environmental provisions

Thank you for your letter of 4 July 2023 requesting an update on certain matters relating to the above Act, following my appearance before the Net Zero, Energy and Transport Committee on 27 June. I have addressed each of your four questions below.

Intergovernmental discussions

Although my colleague Angus Robertson, Cabinet Secretary for Constitution, External Affairs and Culture has led on the overall Scottish Government response to the UK Government's Retained EU Law (Revocation and Reform) Act 2023 (the Act), I can confirm that I lead on communication with UK counterparts on proposed environmental law repeals in the Act.

I remain very concerned and disappointed by the UK Government's decision to ignore legitimate requests from the Devolved Governments for regulations 9 and 10 of the National Emission Ceilings Regulations 2018 to be removed from the revocation schedule now contained within the Act.

I maintain that revocation of these regulations is a policy decision, which will mean a significant gap emerges until an alternative approach to reporting can be agreed and implemented across the four nations. This will result in a lack of transparency and accountability around the UK's emissions reduction pathway for several important air pollutants.

With the Act becoming law, I can again confirm that officials continue to engage in good faith with UK counterparts on the formulation of the replacement scheme with the aim of minimising any air gap in reporting as much as possible.

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We are now seeking further information from the UK Government on its Secondary Legislation programme under the Act and its potential impact on environmental law.

Powers of the Scottish Ministers under the REUL Act

It would not be possible for the Scottish Ministers to use the power in section 1(4) of the Act to make regulations to specify the two pieces of air quality legislation in Schedule 1 to prevent them being revoked. While air quality provisions generally fall within devolved competence, regulations 9 and 10 National Emission Ceilings Regulations 2018 confer functions on the Secretary of State which are exercisable in relation to the UK as a whole; they are therefore not functions exercisable in or as regards Scotland by Scottish Ministers which means that regulations to preserve the functions would not be within devolved competence.

Keeping pace power

For the same reasons as set out in my above response, the Scottish Ministers could not use section 1(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 to preserve the two pieces of air quality legislation. As the Committee says in its letter, section 1(1) gives the Scottish Ministers the power to make provisions corresponding to EU law. Therefore it could potentially be used if Scottish Ministers wanted to confer similar, new duties to have an NAPCP for Scotland to those set out in relation to national air pollution control programmes in article 6 of Directive (EU) 2016/2284 on the reduction of national emissions of certain atmospheric pollutants. However, this would be dependent on a separate policy approach to this issue being developed in Scotland. As I have indicated elsewhere in this response, my preferred position remains for a joint UK approach to continue, subject to acceptable proposals being put forward by Defra.

In relation to other environmental provisions in Schedule 1 over which the Scottish Government has concerns, the Cabinet Secretary for the Constitution, External Affairs and Culture is shortly to respond to the Constitution, Europe, External Affairs and Culture Committee's report on the Supplementary Legislative Consent Memorandum for the then-REUL Bill. This response will include an updated analysis of the instruments in Schedule 1 which were of concern to the Scottish Government.

Implications of the removal of air quality laws in Schedule 1

There are other provisions in law requiring the Scottish Ministers to produce air quality plans and strategies. However, there is no specific requirement in any of these provisions for the publication of the information set out in the NAPCP. The Air Quality Standards (Scotland) Regulations 2010, which form part of retained EU law, require the Scottish Ministers to draw up and implement an air quality action plan for any zone where a limit or target value for any of several air pollutants set out in the 2008 Ambient Air Quality Directive is not being achieved.

The Environment Act 1995 requires the preparation of a UK air quality strategy. Unlike the NAPCP, this strategy does not have to be prepared for the whole of the UK and the function sits with the Scottish Ministers. There is a UK Air Quality Strategy published under the 1995 Act. In addition, the Scottish Government has also produced its own air quality strategy,

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Cleaner Air for Scotland, which was published in 2015 and the current version, Cleaner Air for Scotland 2, which was published in 2021.

The 1995 Act also requires SEPA to have regard to the strategy when exercising its pollution prevention and control functions, and local authorities to have regard to any guidance issued by the Scottish Ministers when undertaking their statutory air quality duties set out in that Act.

My preferred position would be for a UK-wide NAPCP to continue. We are continuing to work collaboratively with Defra and the other devolved governments to reach agreement on this, but a continuation of a joint UK approach will be subject to acceptable proposals being put forward by Defra. Although discussions between my officials and Defra officials are ongoing, Defra has to date provided very little detail on its proposals for alternative reporting arrangements.

Should Defra's proposals prove to be unacceptable to the Scottish Government, as air quality is within devolved competence, it is possible in theory that separate reporting requirements could be developed. However, beyond retained EU law there is an international obligation on the UK to comply with emission ceilings as a signatory to the Convention on Long Range Transboundary Air Pollution.. This still requires reporting at a UK level even if each of the four administrations took a separate approach, so introduction of various separate approaches across the UK would be inefficient and resource intensive. In addition, the air quality Common Framework Agreement includes a commitment to deliver future NAPCPs which demonstrate the policies measures that each administration is implementing or planning to implement in order to reach the UK emission reduction ceilings. The Framework has therefore not been followed on this issue.

I hope you find this information helpful.

Yours sincerely,

MÀIRI MCALLAN

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